Supreme Court, U. S.
FILED
JAN 30 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 74-940

COLORADO RIVER WATER CONSERVATION DISTRICT, SOUTHWESTERN WATER CONSERVATION DISTRICT, BOARD OF WATER COMMISSIONERS, CITY AND COUNTY OF DENVER, COLORADO, SOUTHEASTERN WATER CONSERVANCY DISTRICT AND MANCOS WATER CONSERVANCY DISTRICT,
Petitioners

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. 74-

COLORADO RIVER WATER CONSERVATION DISTRICT, SOUTHWESTERN WATER CONSERVATION DISTRICT, BOARD OF WATER COMMISSIONERS, CITY AND COUNTY OF DENVER, COLORADO, SOUTHEASTERN WATER CONSERVANCY DISTRICT AND MANCOS WATER CONSERVANCY DISTRICT,
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UNITED STATES OF AMERICA, *Respondent.*

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The Colorado River Water Conservation District, the Southwestern Water Conservation District, the Board of Water Commissioners, City and County of Denver, Colorado, the Southeastern Water Conservancy District and the Mancos Water Conservancy District, five public agencies of the State of Colorado, respectfully pray that a writ of certiorari issue to re-

view a judgment of the United States Court of Appeals for the Tenth Circuit entered October 2, 1974.[1]

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 504 F. 2d 115 and appears as *Appendix A* hereto. A copy of the transcript of the orally issued findings of fact, conclusions of law and order of the United States District Court for the District of Colorado appears as *Appendix B* hereto.

JURISDICTION

The judgment of the court of appeals in this case was entered on October 2, 1974. A timely petition for rehearing and suggestion for rehearing *en banc* by the petitioners and others was denied on November 12, 1974.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

While subjecting all of its claims to water (including appropriative and reserved rights) to adjudication in the state water courts in three of Colorado's seven water divisions following this Court's March

[1] The initial action below was captioned *United States of America* v. *Mary Akin, et al.* and was brought against some 1,200 named Colorado citzens as well as "all unknown claimants" alleged to be using waters of the San Juan River and its tributaries in Colorado. In addition to your petitioners herein, intervening defendants include the State of Colorado on behalf of the State Board of Agriculture and the Colorado Game and Fish Commission. It is anticipated that one or more similar petitions for certiorari will be filed on behalf of some of these as well as other intervening defendants.

[2] Circuit Judges Holloway and Barrett would have granted an *en banc* hearing.

1971 opinions in *Eagle County* [3] and *Water Division 5*,[4] the United States in November 1972 instituted a suit in the United States District Court in Denver against some 1200 named water users and unnamed others, seeking to have declared and determined all of its claims to the use of water in the San Juan River basin (within Water Division 7), including claims as trustee for two Indian reservations. Shortly thereafter the United States, having been served in Water Division 7 under the McCarran Amendment (43 U.S.C. § 666), submitted for adjudication in the state proceedings all of its claims to the use of water on the Dolores River and its tributaries in Water Division 7, but failed to submit those tendered in the U. S. District Court. The District Court granted a motion to dismiss the United States on grounds of abstention or by comity. In these circumstances:

1. Did the District Court properly exercise its discretion in invoking the abstention and comity principles?
2. Did Congress intend in the McCarran Amendment that general water rights adjudications, such as involved here, be conducted in state proceedings?

[3] *U.S.* v. *District Court in and for the County of Eagle, State of Colorado, et al.*, 401 U.S. 520 (1971).

[4] *U.S.* v. *District Court in and for Water Division No. 5, State of Colorado, and the Judge thereof, the Honorable Clifford H. Darrow, and the Water Referee thereof*, 401 U.S. 527 (1971).

STATUTES INVOLVED

The immediate federal statutory provision involved is 43 U.S.C. § 666, 66 Stat. 560, commonly referred to as the McCarran Amendment, which provides:

> § 666. Suits for adjudication of water rights—
>
> *Joinder of the United States as defendant; costs*
>
> (a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* that no judgment for costs shall be entered against the United States in any such suit.
>
> *Service of Summons*
>
> (b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.
>
> *Joinder in suits involving use of interstate streams by State*
>
> (c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. July 10, 1952, c. 651, Title II, § 208(a)-(c), 66 Stat. 560.

Also involved is the Water Rights Determination and Administration Act of 1969, Colorado Revised Statutes (1963), § 148-21-1 et seq., (as amended) commonly called the 1969 Act, which provides a system for the adjudication of the waters of the natural streams in the State of Colorado.

Both statutes were construed by this Court in *Eagle County* and *Water Division 5.*

STATEMENT

The United States instituted this action on November 14, 1972, in the United States District Court for the District of Colorado [5] seeking to have declared and determined against some 1200 named defendants and unknown others all of its claims to the use of the waters of the San Juan River and its tributaries in Colorado. The San Juan and its tributaries are a part of the Colorado River system. The U. S. claims include claimed appropriative rights under state law as well as reserved rights. Among the reserved rights asserted are those for use in connection with Mesa Verde National Park, the Yucca House and Hovenweep National Monuments, and the San Juan National Forest. Claims to appropriative rights include those for Bu-

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[5] A copy of the complaint is attached hereto as *Appendix C.* Jurisdiction was asserted under 28 U.S.C. 1345, which provides in pertinent part:

> *Except* as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States . . . (emphasis supplied).

reau of Reclamation projects along the San Juan and for other lands administered by the Bureau of Land Management in the area. Also, for itself and on behalf of the Indian tribes, the United States claimed reserved rights for use in connection with the Ute Mountain Ute and Southern Ute Indian Reservations. The extent and location of all of these claims, however, are totally undefined.

As this Court may recall from its consideration in 1971 of *Eagle County* and *Water Division 5,* companion cases involving Colorado water law and Government claims to waters within that State, as a consequence of the 1969 Act the State is now divided into seven water divisions. The litigation sought to be reviewed here relates to claims in only the San Juan basin in Water Division 7.[6]

When it brought this suit in the U. S. District Court in Denver, the United States was then and still is participating in proceedings in Water Divisions 4, 5 and 6, as well as in former Water Districts 36, 37, 51 and 52. The Government's participation in those proceedings followed this Court's unanimous opinions in *Eagle County* and *Water Division 5* holding that § 666 subjected all U. S. claims, including those to reserved rights, to the state adjudicatory proceedings. When

[6]The principal tributaries of the Colorado River in the Colorado River Basin originate within Colorado and the annual average outflow from the state amounts to some 80% of the river's flow at Lee Ferry, the gauging station between the Upper and Lower Basins under the Colorado River Compact of 1922 (see *Arizona* v. *California*, 373 U.S. 546 (1963)). Though the San Juan River Basin is by no means the largest contributing source, its proper administration with relation to other Colorado contributor tributaries is critical in the administration of water uses on all of the streams in Colorado naturally draining to Lee Ferry.

state proceedings were instituted in Water Division 7 on January 3, 1973, however, the United States failed to file the claims it had asserted in the federal court in Denver and instead filed water claims only as to the Dolores River drainage,[7] a separate stream system within Water Division 7, on which it alleged it had claims which had not been made in the federal court. A map of Water Division 7 showing the principal drainage areas is attached as *Appendix D.* The Government's claims to water rights in the pending state proceedings are identical to those now being made by the Government in the federal district court, save that the claims in Denver include reserved rights for the two Indian reservations.

Upon reviewing all of these circumstances the district court granted a motion to dismiss. The court found that Colorado had a well defined, workable system for water adjudication; that the Government under *Eagle County* and *Water Division 5* was not immune from suit; that the Government was pursuing all of its claims in Water Divisions 4, 5 and 6 and had been served in 7; and that while § 666, *Eagle County* and *Water Division 5* might not require exclusive jurisdiction in state courts (App. B, p. 19a):

> . . . they nonetheless point to our satisfaction that deferral of jurisdiction to state courts is justified when, as a practical matter, retention of federal

[7] Included as a part of the claims in the state water court proceeding in Water Divsion 7 are those made in connection with that part of the San Juan National Forest in the Dolores River drainage. Thus the Government proposes to split the adjudication of claims in connection with that Forest between the water court in Water Division 7 and the federal court in Denver, forums over 300 airline miles apart.

jurisdiction on some claims would result in a piecemeal solution of a larger problem.

The district court was further concerned with the dual system of decrees which would result and the possibility of conflicts eventually requiring additional litigation; considered it would be an unreasonable burden on the 1200 to 1500 citizens who had proximity to the state court but not to the federal court in Denver; saw the state court as having the same obligation to enforce federal law as well as having a considerable expertise in questions of water law which had been a hundred years in development; and concluded that federal jurisdiction should be withheld on the principles of abstention and of comity (App. B, p. 20a):

> . . . [as the state forum] can fully and adequately adjudicate the issues . . . be they the national forests, the indian tribes, or any other individual litigants. To this end the court is granting the defendants' Motion to Dismiss.

The Government appealed to the Tenth Circuit. That court recognized that the dismissal below was on the ground of the abstention doctrine and for reasons of comity. The circuit, however, viewing the decision to abstain as the primary issue, said that this Court, *inter alia,* had not held or even suggested in *Eagle County* and *Water Division 5* that abstention be ordered and reversed the judgment below.

REASONS FOR GRANTING THE WRIT

It is important that this Court determine now whether the district court soundly exercised its discretion in abstaining from hearing the U.S. claims of water rights involved here. The court of appeals adopted an overly narrow view of abstention, and without making any reference to the principles of comity or finding any abuse of discretion by the district court, substituted its own opinion and reversed.

As a consequence there is presented the spectacle of the federal district court and the state water courts considering simultaneously the same factual and legal issues dealing with claims to the use of water. There is no question that the state water courts can do this more efficiently, not to mention the relief accorded the federal courts through being released from extended and burdensome litigation. In addition the result from the state proceedings will present a complete decision and avoid a piecemeal solution. As was the case in *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 391 U.S. 593 (1968), sound judicial administration requires abstention here.

Present Colorado water users are faced with insurmountable problems of relitigating in federal court water rights in some cases over one hundred years in decree (if they have the available proof). Ironically, in spite of the Government's insistence to place this burden on the Colorado citizenry, the United States cannot, under the procedure chosen, achieve the relief to which it should be entitled.

Nor is there any doubt whatsoever since this Court's rulings in *Eagle County* and *Water Division 5* that the state courts have complete jurisdiction of *all* federal claims to the use of water, whether they involve appropriative rights, riparian rights or reserved rights. As this Court noted in those cases, if there is a collision between any rights of the litigants and the reserved rights, the federal question can be preserved in the state decision and brought here for review.

Indeed, the reasons of sound judicial administration—to permit established state procedures to work in a specialized field—and the availability of review here should any complaint remain, are so strong and compelling as to call for the exercise of this Court's power of supervision, as in *Kaiser,* through summary reversal.

1. Sound judicial administration requires affirmance of the District Court's exercise of its discretion to abstain.

The practical problems which result from the action of the Tenth Circuit in reversing are formidable and not in the interests of sound judicial administration. That court perceived the meaning of the abstention principle by noting (App. A, p. 10a):

> . . . [it] is that federal courts in the exercise of a wise discretion are to restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the Federal Judiciary. *Railroad Commission of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941).

But the circuit then failed to apply the principle by not recognizing, or even commenting upon, the practical ingredients which led to the exercise of a wise discretion by the district court.

The practicalities of the situation were emphasized by the district court in reaching its result. Note was taken of the fact that the United States had already filed like claims in Divisions 4, 5 and 6 and had been served in Division 7. The court then observed (App. B, p. 19a):

> . . . a *practical* approach must recognize that we would be creating a dual system of administration

> and decrees of water rights and potentially could require water users needlessly to readjudicate rights already decreed under state law (emphasis supplied).

The district court further noted (App. B, pp. 19a-20a):

> . . . water users have proximity to state courts and from a distance factor alone there are *practical* impediments to requiring everyone in this particular area to litigate the matter in the federal courts.
>
> Further the Court is satisfied from a *practical* approach that this would be perhaps an unreasonable burden placed upon the citizens of Colorado . . . (emphasis supplied).

The district court adverted again to the state mechanism which was already functioning on like federal claims (App. B, p. 20a):

> . . . [In] attempting to locate individual water rights . . . the forums that are established through the state are recognized as a workable network of administration with considerable expertise under a body of state law that has been a hundred years in development and perhaps the system of priorities and propositions runs parallel to the history of the state and in fact is engrained in the Colorado Constitution. The court can see no *practical* argument in having or persuasive argument in having another forum exercise jurisdiction (emphasis supplied).

Thus the district court with all of these considerations in mind, and familiar with the history of the McCarran Amendment and this Court's *Eagle* and *Water Division 5* opinions, held that (App. B, p. 19a):

> . . . deferral of jurisdiction to state courts is justified when, as a *practical matter,* retention of

federal jurisdiction on some claims would result in a piecemeal solution of a larger problem (emphasis supplied).

There are other very important practical concerns calling for reversal of the judgment below which were not elaborated upon by either the district or circuit court. Chief among these is the unlikelihood that the United States can obtain the desired relief due to the fact that there is no federal system for the adjudication and administration of water rights comparable to the state system. For example, in the state proceedings notice to all is given by publication. Those having previously adjudicated rights considered not to be endangered by other claims whether local or federal have the option of not appearing without consequent or at least recognizable effect on the quality or validity of their decrees. This contrasts sharply with the proceeding instituted by the United States below where the Government asks for an order requiring all defendant claimants, named *and unknown,* to appear and establish their claims[8] to use water in the affected area with no notice whatsoever to the unknown claimants. As far as the named defendants are concerned, all probably have decrees, many entered before the turn of the century, from a state court. The problems of producing evidence of rights may be insurmountable for many of them.

In addition, the realities of the interstate water user picture make it apparent that any water decree rendered in the district court would not be fully effec-

[8] See Prayer, para. 1, Appendix C 36a-37a.

tive. The western slope of Colorado contains the headwaters of the major streams and rivers which are all tributary to the Colorado River, many of which join the Colorado River after they have passed the state boundaries. Nonetheless, the Colorado River and all its tributaries have been made into an integrated system for the purposes of water allocation and administration by a series of interstate agreements.[9] The share allotted to each state by these Compacts is divided among the users within a state by the procedures existing within each state for the adjudication and distribution of water. The water burden each state must absorb includes, of course, the claims of the United States in such state.

There are in the Colorado River drainage in Colorado, apart from the San Juan Basin and exclusive of the claims of the United States, something in excess of 10,000 water rights. Since the compacts provide no stream by stream allocation of the share of water to which Colorado users are entitled, it is evident that the effect of the requested water rights is not confined to the tributary drainages in which the requested rights are located. Under state procedures, interested parties outside of the water division in-

[9] The Colorado River Compact of 1922 approved by the Congress in 1929 in the Boulder Canyon Project Act, 45 Stat. 1057, 1064 and which was declared effective by Presidential Proclamation, 46 Stat. 3000 (see also 7 Colo. Rev. Stat. 658 (149-2-1 C.R.S. 1963)) apportions the total flow of the Colorado River between the Upper Basin, (principally, the states of Colorado, New Mexico, Utah and Wyoming) and the Lower Basin, (principally, Arizona, California and Nevada). The Upper Colorado River Basin Compact of 1948, approved by the Congress in 1949, 63 Stat. 31 (see also 7 Colo. Rev. Stat. 695 (149-8-1 C.R.S. 1963), divides the waters apportioned by the 1922 Compact among the Upper Basin states.

volved are also given sufficient notice by publication, are entitled to appear, and, appearing, are bound by the results unless, not having received notice, they appear before the limitation period expires.[10] But under the procedure chosen by the United States here, the Colorado River users located in Colorado but not named will not receive notice and consequently will not be bound. If the United States is allowed to proceed with its case, the obtaining of a piecemeal water right solution which is effective against some users, but which may not be effective against others, would throw the statewide administrative mechanism into chaos.[11]

The district court sought to avoid this evident quagmire ". . . for a totality of the reasons expressed under the doctrine of abstention or by comity." The circuit, while agreeing that state courts did have jurisdiction, ignored comity and without making any reference to the practical concerns of the district judge, chose a frankly "narrow scope" (App. A, p. 10a) to review and reverse the discretion exercised.

Suffice it to say, contrary to the opinion of the circuit, the claims of the United States obviously present state questions on appropriative rights identical with those already under adjudication in the state water courts so that *Railroad Commission of Texas* v. *Pullman,* 312 U.S. 496 (1941) cannot be lightly dismissed; that a

[10] Colo. Rev. Stat. (1963) 148-21-20(10), (as amended) limits the period when an adversely affected person may petition the court for redress to three (3) years.

[11] The United States also asks for an order enjoining all uses of water except in accordance with the decree to be ultimately entered, and for the appointment of a Water Master to administer the decree. The additional unnecessary layer that this would impose and the potential for endless conflict between these layers in the same area of the state should certainly be avoided.

state regulatory scheme could not be more clearly involved, so that the rule of *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943) should have been given greater consideration[12]; and that where all of the questions involve water, a matter of vital concern as one of the most valuable natural resources of the arid west, this Court's approach in *Kaiser Steel Corp.* v. *W. S. Ranch Co.* would have been appropriate.[13]

The practical considerations so important to the district court's staying of its hand equate perfectly to the "special circumstances" which justify application of the principles of comity and abstention. Thus, if the pendency of claims of an identical nature in current state proceedings[14]; if the avoidance of a piecemeal solution to a broad vital problem involving a precious natural resource; if the transporting of hundreds of citizens to a removed forum in lieu of their own courthouse, to engage in an imperfect procedure, often with the practical inability to call long dead witnesses to reprove a valid priority of right; if the disruption of a long evolved state procedure for the orderly, equitable administration of this vital resource—if all these are

[12] Nor should the avoidance of needless friction or unseemly conflict between officials or sovereignties as in *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U.S. 25 (1959), and *Martin* v. *Creasy,* 360 U.S. 219 (1959), be disregarded. See also *Allegheny Airlines, Inc.* v. *Pennsylvania P.U.C.,* 465 F.2d 237, (3d Cir. 1972), *cert. denied,* 410 U.S. 943 (1973).

[13] In view of the existing proceedings in the state courts and the availabilty of review here should the United States have any complaint following the state proceedings, the retention of jurisdiction deemed desirable in the particular circumstances of *Kaiser* is not required here.

[14] The division of the adjudication of United States water rights in the San Juan National Forest is but one example.

not circumstances justifying the staying of the federal hand, whether it be called abstention or comity, those doctrines will never be applicable.

2. The authority of the state courts to adjudicate *all* water claims of the U.S., whether appropriative, riparian, or reserved, is clear.

As has heretofore been noted, this Court in *Eagle County* and *Water Division 5* unanimously determined the propriety and capability of state water courts determining and adjudicating all federal claims to the use of water within a state, howsoever those rights may have come into existence. Neither case admits or suggests any exception to this jurisdiction. The cases note that relief from error, if any, committed by the state courts, is available to the United States in this Court.

In *Eagle County* and *Water Division 5* the Government, citing among other cases *Winters* v. *U.S.*, 207 U.S. 564 (1908), and *Arizona* v. *California,* 373 U.S. 546 (1963), acknowledged that the doctrine of the implied reservation of waters upon the establishment of an Indian reservation found its genesis in *Winters* and was extended in *Arizona* v. *California* to other types of reservations. The Government did not, however, in the 1971 cases, make any attempt to differentiate as to jurisdiction between the variety of claimed reserved rights. Now by an attempted reversal of field, the Government seeks to keep its myriad claims before the federal court relying on supposed exclusive federal jurisdiction of its claims for Indian reservations. The Government rests its argument that this case must be tried in federal court on a footnote in its opening brief in

Water Division 5 with respect to claims for Indian lands.[15]

We believe this reliance to be misplaced for four principal reasons. First, the footnote followed reference to the Government's brief in *Eagle County* in which was made a detailed recitation of the magnitude of reserved rights, including specific reference to their claims to the reservations of water for Indian lands.

Second, their claims made below, in addition to the Indian claims, include all federal claims in the San Juan River Basin in Colorado,[16] appropriative as well as reserved, including national forests, parks, and the like. It is thus clear the Government seeks to make nugatory the results of *Eagle County* and *Water Division 5,* and effectively repeal the McCarran Amendment by filing first in federal court blanketing therein all Federal claims, appropriative as well as reserved, under the cover of the alleged exclusive federal jurisdiction over their Indian claims.

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[15] Fn. 3, p. 10, as follows:

> To the best of our knowledge, none of the reserved water rights claimed by the United States in Water Division 5 relate to Indian lands. In the event that this Court should rule that 43 U.S.C. § 666 subjects Federal reserved rights in general to state adjudication, there would remain the further question (not presented by this case) whether the consent statute covers water rights held by the United States in trust for specific Indian tribes—frequently pursuant to treaty—rather than for the benefit of the general public.

Additionally, the Government again contends that its claims for Indian lands will not be dealt with justly in state courts. Such contention was completely rejected by this Court in *Eagle County and Water Division 5.*

[16] See Appendix C.

Third, events subsequent to the decisions in *Eagle County* and *Water Division 5,* including a filing in those cases by one Indian tribe in this Court [17], would indicate that those decisions intended the adjudication of all federal reserved water rights be in the state courts under state procedures. Extensive hearings were held by a subcommittee of the Committee on the Judiciary, United States Senate, on all Indian rights, where Justice Department witnesses, while relying heavily on the aforementioned *Water Division 5* footnote, suggested the surest resolution of the problem was Congressional action amending § 666 to grant a right of removal to the Government.[18] No such Congressional action has been taken.

It seems clear that this Court, in those two decisions in 1971, was attempting, by interpreting the McCarran Amendment to mean what it so clearly says, to eliminate the perplexities and conflicts of apparent duality of jurisdiction over water adjudication matters.[19]

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[17] Suggestion of Interest of The Fort Mojave Tribe of Indians and Points and Authorities in Support Thereof. This filing was rejected, 401 U.S. 940 (1971).

[18] Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, 92d Cong., 1st Sess. (1971-72) in seven parts. See particularly Pt. 1, pp. 13, 14, 25 and 32.

[19] One case in Colorado, filed in 1949 (pre-McCarran Amendment days), in decree in 1955, supplemental decree in 1964, is yet the subject of contention and strife in federal court with no end in sight. *United States* v. *Northern Colorado Water Conservancy District, et al.,* Consolidated cases, Nos. 2187, 5016, 5017. The result of this pre-McCarran assumption of jurisdiction involved removal of two state court adjudications, proof of diligence in completion of appropriations in two forums, confusion as to who is involved and who is bound, and considerable uncertainty as to who got decrees for what. Only recently, the Court of Appeals for the Tenth Circuit, in an unpublished opinion (No. 73-1300), was required to decide a question easily disposed of, had the matter been in state court under state procedures.

Fourth, this Court made it unequivocally clear in *Eagle County* and *Water Division 5* that all claims of all parties however derived and irrespective of the use to which the water might be put, were to be adjudicated in the state court proceeding.

This Court said in *Eagle County,* in disposing of the argument that § 666 did not cover reserved water rights, at p. 524:

> . . . We reject that conclusion for we deal with an all-inclusive statute concerning "the adjudication of rights to the use of water of a river system" which in §666 (a)(1) has no exceptions and which, as we read it, includes appropriative rights, riparian rights, and reserved rights.

And further at p. 525:

> . . . This proceeding, unlike the one in *Dugan,* is not a private one to determine whether named claimants have priority over the United States. The whole community of claims is involved . . . .

And, similarly, in *Water Division 5,* this Court said, at p. 529-30:

> . . . The present suit, like the one in the *Eagle County* case, reaches all claims, perhaps month by month but inclusively in the totality; and, as we said in the other case, if there is a collision between prior adjudicated rights and reserved rights of the United States, the federal questions can be preserved in the state decision and brought here for review.

CONCLUSION

For the foregoing reasons petitioners respectfully urge this Court act to the end that the clarity and simplicity brought to water adjudication and administrative problems in appropriation states by this Courts' decisions in *Eagle County* and *Water Division No. 5* should not be nullified by the decision below. The petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.

No. 73-1807.

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

v.

MARY AKIN *et al., Defendants-Appellees.*

Submitted Aug. 19, 1974.

Decided Oct. 2, 1974.

Rehearing Denied Nov. 12, 1974.

United States brought action, in its own behalf and on behalf of two Indian tribes, for adjudication of reserved water rights in the San Juan Basin. Parties which had intervened as defendants filed state court action involving the same subject matter. The District Court for the District of Colorado, Sherman G. Finesilver, J., abstained and United States appealed. The Court of Appeals, William E. Doyle, Circuit Judge, held that statute which allows United States to be joined in state court action brought to determine water rights, did not preclude United States district court from exercising jurisdiction over action brought by the United States involving water rights; and that the district court should not have abstained.

Reversed and remanded.

Walter Kiechel, Jr., Deputy Asst. Atty. Gen. (Wallace H. Johnson, Asst. Atty. Gen., and Edmund B. Clarke, Donald W. Redd, and Lawrence E. Shearer, Attys., Dept. of Justice, Washington, D. C., on the brief), for plaintiff-appellant.

John E. Bush, Deputy Atty. Gen. (John P. Moore, Atty. Gen., Clyde O. Martz, Raphael J. Moses, and James D. Geissinger, Special Asst. Attys. Gen., on the brief), for defendants-appellees The State Board of Agriculture and

The Colorado Game and Fish Commission (Colorado Wildlife Commission and Colorado Board of Parks and Outdoor Recreation).

L. W. McDaniel, Durango, Colo., on the brief for defendant-appellee Southwestern Water Conservancy District.

Fairfield & Woods and Ireland, Stapleton, Pryor & Holmes, P. C., Denver, Colo., on the brief, for defendant-appellee Mancos Water Conservancy District.

Fairfield & Woods, Denver, Colo., on the brief for defendant-appellee Southeastern Colorado Water Conservancy District.

Kenneth Balcomb, Glenwood Springs, Colo., for intervenor-appellee Colorado River Water Conservation District.

Thomas W. Fredericks, David H. Getches and Robert S. Pelcyger, Attys., Native American Rights Fund, Boulder, Colo., on the brief of amici curiae Southern Ute Indian Tribe, Ute Mountain Ute Indian Tribe and National Tribal Chairmen's Association.

George L. Zoellner, Kenneth L. Broadhurst, Glenn Saunders, Special Counsel and Jack Ross, Special Counsel, Denver, Colo., on the brief, for defendant-appellee City and County of Denver, acting by and through its Board of Water Commissioners.

Before HILL and DOYLE, Circuit Judges, and TALBOT SMITH*, District Judge.

WILLIAM E. DOYLE, Circuit Judge.

The questions presented in this appeal are, first, whether or not the District Court had jurisdiction to entertain this action which was instituted by the United States on its own

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* Honorable Talbot Smith, United States District Judge, Ann Arbor, Michigan sitting by designation.

behalf and on behalf of certain Indian tribes, or, secondly, assuming that the District Court had jurisdiction, whether the court should have abstained.

This is a water rights case which was instituted by the United States in the United States District Court for the District of Colorado. The action was brought on behalf of the United States and on behalf of the Ute Mountain and Southern Ute Indian Tribes on November 14, 1972. It sought the adjudication of all water rights held by the United States in its own right and as trustee for the Ute Mountain and Southern Ute Indian Tribes in the San Juan Basin but, particularly, adjudication of all of its reserved rights in the San Juan River of Colorado. There are approximately 1200 named defendants.

The reserved rights asserted by the United States consist of those used in connection with Mesa Verde National Park, the Yucca House National Monument, the Hovenweep National Monument, Bureau of Reclamation projects within the State of Colorado and lands reserved by the United States in Colorado. On behalf of the Indian tribes the United States claims further reserved rights for use of the Ute Mountain Ute Tribe and the Southern Utes on their reservations. The Colorado River Water Conservation District intervened as a defendant for the purpose of filing a motion to dismiss. Other intervenors followed including the Southeastern Colorado Water Conservancy District and the Board of Water Commissioners, City and County of Denver.

A subsequent suit was filed on January 3, 1973 in State Court by the Mancos Water Conservation District and the Southeastern Colorado Water Conservancy District embracing similar subject matter.** In this action the plain-

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** It has been called to our attention in an informal letter from one of the attorneys for defendants-appellees that this statement is incorrect. It is said that on that date Southwestern Colorado Water Conservation District filed a motion for the joinder of the United States under the McCarran Act. The record does not reveal the true fact. We note the suggested correction, even though it is not outcome determinative.

tiffs sought judicial determination of the identical water rights which the United States sought to have adjudicated. The United States was joined as a defendant in the state action pursuant to the so-called McCarran Amendment, 43 U.S.C. § 666, which allows a joinder of the United States in such a suit in state court.

The United States District Court's dismissal of the action was on the ground of the abstention doctrine and for reasons of "comity." In effect, therefore, the court's assumption was that it had jurisdiction.

Thus, the primary issue is whether the trial court erred in its decision to abstain. Inasmuch as the defendants-appellees also contend that the District Court lacked jurisdiction to hear the case, we shall take up that issue also.

I.

The Jurisdiction Question

The United States has alleged that jurisdiction in District Court was conferred by 28 U.S.C. § 1345 which gives to district courts original jurisdiction of all civil actions commenced by the United States except as otherwise provided.

The Colorado River Water Conservation District takes the position that 43 U.S.C. § 666, the McCarran Amendment, which gives consent to joinder of the United States "in any suit for the adjudication of rights to the use of water," etc.,[1] not only gives a state court jurisdiction over

[1] The full context of this section reads as follows:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

the United States, it also, according to their further argument, excludes federal courts from assuming jurisdiction. We disagree.

The starting point in this analysis is Article III of the United States Constitution which extends the judicial power to controversies to which the United States shall be a party. Although this provision is not self-implementing, it does evidence the intention of the Framers to allow the United States to sue in its own courts. The statute, § 1345, *supra*, confirms this right of the United States.[2]

The rationale for the right of the United States to sue in federal court is expressed by Mr. Justice Story in his work, Story, The Constitution § 1674:

> It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privi-

[2] Section 1345, *supra*, provides:

> § 1345. United States as plaintiff
>
> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

leges in their sovereign capacity would be at the mercy of the states.

The right was recognized from the earliest days in our history. The Judiciary Act of 1789 gave the district courts jurisdiction concurrent with that of the state courts "of all suits at common law where the United States shall sue." This Act also gave the circuit courts jurisdiction "of all suits of a civil nature at common law or in equity," subject to a jurisdictional amount. The clear right of the United States to maintain actions asserting proprietary rights is discussed in H. M. Hart & H. Wechsler, The Federal Courts and The Federal System (2d ed. 1973), at 1301-09. The authors cite Cotton v. United States, 11 How. 229, 13 L.Ed. 675 (1850) as an example of the right of the United States to bring an action even without an authorizing statute. That was a trespass case.

With respect to the cases in which the government asserts a proprietary right, the authors say:

> The most striking recent examples of the assertion of proprietary rights of the United States, illustrating the magnitude of the interests that may be involved, were the much-disputed tidelands cases. Compare the motion of the United States for leave to intervene in Nebraska v. Wyoming, 304 U.S. 545 [58 S.Ct. 1035, 82 L.Ed. 1519] (1938). See Comment, Federal Ownership of Inland Waters: The Fallbrook Case, 31 Tex.L.Rev. 404 (1953). See also the cases growing out of the oil scandals of the Harding administration. Pan American Petroleum & Transport Co. v. United States, 273 U.S. 456 [47 S.Ct. 416, 71 L.Ed. 734] (1927); Mammoth Oil Co. v. United States, 275 U.S. 13 [48 S.Ct. 1, 72 L.Ed. 137] (1927).
>
> Closely related to the proprietary cases are those in which the United States has established its status as guardian of the Indian tribes and its standing in litiga-

> tion to vindicate Indian rights. See, *e.g.*, Heckman v. United States, 224 U.S. 413 [32 S.Ct. 424, 56 L.Ed. 820] (1912); United States v. Board of Comm'rs of Osage County, 251 U.S. 128 [40 S.Ct. 100, 64 L.Ed. 184] (1919); Cummings & McFarland, Federal Justice 250-317, 384-413 (1937).

H. M. Hart & H. Wechsler, The Federal Courts and The Federal System (2d ed. 1973), at 1302.

The McCarran Amendment does not express an intention that the United States shall utilize state courts for the purpose of litigating its claims to water. It is said by appellees that the original language of the Amendment contained a proviso which allowed the United States to remove to federal court any action in which it was a defendant within the scope of the waiver of sovereign immunity contained in the Amendment. The argument continues that since Congress dropped this proviso it follows that Congress intended to deprive the United States of its right to sue under § 1345. We disagree with the conclusion drawn. The McCarran Amendment merely allowed the United States to be *joined* in a state action in a case in which the United States own water rights and is a necessary party to the suit. However, this falls short of furnishing by implication a repeal of § 1345 applicable to water cases. The Amendment's purpose was to permit complete adjudication in a state court action and to prevent frustration of the parties because of inability to obtain jurisdiction over the United States. So, elimination of the removal proviso originally in the Amendment at most expressed congressional intent that where the United States is joined under the circumstances set forth in the Amendment it will not be allowed to frustrate the procedures in the state court. But the statute did not prohibit the United States from ever removing a water rights case to the federal court. If Congress had intended to force the United States to litigate its water cases in state courts, it could have done so by creating a water rights

exception to § 1345. This it did not do either expressly or impliedly.[3]

The decisions in United States v. District Court, County of Eagle, Colorado, 401 U.S. 520, 525, 91 S.Ct. 998, 28 L.Ed. 2d 278 (1971) and United States v. District Court, Water Division No. 5, Colo., 401 U.S. 527, 91 S.Ct. 1003, 28 L.Ed. 2d 284 (1971) do not support the appellees in their present contentions. The issue in both of these was whether the consent to suit of the United States by provision of the McCarran Amendment extended to reserved rights. The Supreme Court held that the Amendment did include this type of right and it followed that the United States could be joined as a *defendant* in a state water rights proceeding. But by so holding the Court did not impliedly say that the United States was prohibited from litigating its reserved water rights as a plaintiff in federal court. At most, it held that the McCarran Amendment authorized a concurrent jurisdiction with state courts to try federal water rights cases—concurrent with the jurisdiction of the federal courts under § 1345, *supra*. This is far different from appellees' position that the Amendment prohibits the United States' litigation of these rights in federal court.

Nor does the decision of the United States District Court for the District of Utah in In re Green River Drainage

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[3] Senator McCarran himself stated that:

> S.18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

S.Rep.No. 755, 82d Cong., 1st Sess., at 9. *See also* United States v. District Court, County of Eagle, Colorado, 401 U.S. 520, 525, 91 S.Ct. 998, 28 L.Ed. 2d 278 (1971); Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); Nevada ex rel. Shamberger v. United States, 279 F.2d 699 (9th Cir. 1960).

Area, 147 F.Supp. 127 (D.Utah 1956) support appellees. This was a removal problem wherein the court held that the United States cannot automatically remove its water rights cases to federal court. The court conceded that the McCarran Amendment does not preclude such removal if it would otherwise be removable.

The Supreme Court in Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963) considered a situation in which the United States was joined as a defendant in a private suit to determine water rights solely between certain private claimants and the United States. The Court held that the McCarran Amendment was not intended to apply to a private suit between the United States and a private party to determine conflicting water rights contentions.

We must then reject the notion that the McCarran Amendment partially repealed or modified § 1345, *supra*. This conclusion suggests that § 666 has a very limited coverage and is perhaps only procedural. It permits, but does not necessarily require, the United States being subjected to state jurisdiction.

II.

The Abstention Question

Having concluded that the United States District Court's jurisdiction was unimpaired, the issue remains whether, considering the character of the case, the District Court was correct in its abstention stance. The Conservation Districts together with the Board of Water Commissioners, State Board of Agriculture and the Colorado Game and Fish Commission assert, of course, that abstention was proper. The United States complains that the court's action was erroneous.

It has been recognized from very early times that federal courts are not to decline the exercise of expressly

granted jurisdiction. This principle was first expressed by Mr. Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821). This oft-repeated statement was that "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." On its face this concept conflicts with the abstention principle which is that federal courts in the exercise of a wise discretion are to restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the Federal Judiciary. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

A. *Guidelines*

It is, of course, fundamental that the doctrine of abstention is to be applied in narrowly limited special circumstances. *See* Zwickler v. Koota, 389 U.S. 241, 248, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967) (citing Propper v. Clark, 337 U.S. 472, 492, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949)). *See also* Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed. 2d 36 (1972); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959); Meredith v. City of Winter Haven, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9 (1943).

B. *Applicable Areas*

1. The Supreme Court placed it in perspective when it said that it is an extraordinarily narrow exception to the rule that a federal court has a duty to adjudicate a controversy presented to it over which it has jurisdiction. *See* County of Allegheny v. Frank Mashuda Co., *supra*, and *see* Meredith v. City of Winter Haven, *supra*. It is within this narrow scope that we examine the various cases which have applied the abstention principle.

One facet of the abstention doctrine is that which seeks to give a state court full opportunity to dispose of a case which is potentially governed by state law before entertaining it and deciding it as a constitutional law question. *See* Railroad Commission of Texas v. Pullman Company, *supra*, a case in which the parties being regulated sought an injunction against enforcement of an order of the state regulatory agency.

Ours is not a case which presents constitutional questions and state questions, both of which show capability for disposing of the case whereby the state decision could obviate the necessity for a constitutional law decision.

2. A second abstention category is exemplified in Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), which holds that federal courts are not to interfere with state regulatory schemes; that they are to refrain from anticipating a constitutional question and interfering with the state regulatory agency when it is engaged in administering state law. *See* Alabama Public Service Comm. v. Southern Ry. Co., 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951); Hawks v. Hamill, 288 U.S. 52, 53 S.Ct. 240, 77 L.Ed. 610 (1933); 1A J. Moore, Moore's Federal Practice § 0.203 [1]; C. Wright, Law of Federal Courts 200 (2d ed. 1970).

Here the federal court is not shortcircuiting or interfering with efforts of a state administrative regulatory system, whereby the *Burford* rule could operate.

3. A further recent application of abstention is in cases in which a novel and important issue of state law is presented. *See* Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593, 88 S.Ct. 1753, 20 L.Ed.2d 835 (1968). *Kaiser* was a New Mexico eminent domain and water case. It concerned alleged inconsistency between a New Mexico statute and the New Mexico Constitution. Based on the fact that this was a novel and highly important question for the State of New Mexico, it was ruled that abstention was there appropriate. This holding was not dissimilar from Louisiana Power & Light Co. v. City of Thibodaux, 360

U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959). *Compare* County of Allegheny v. Frank Mashuda Co., *supra*. The fact, however, that both *Kaiser* and our case involve water rights does not render *Kaiser* determinative.

C. *The Race to the Courthouse*

The Colorado litigants also argue strenuously that this cause must not be determined by who wins the race to the courthouse. This is a recurring contention in cases in which state and federal courts have concurrent jurisdiction over a property case. True, the race idea has no intrinsic attractiveness. At the same time, it must be recognized that priority of filing has validity in the situation in which concurrent jurisdiction exists. The priority of the court which first acquires jurisdiction over the subject matter is entitled to recognition, and where the plaintiff has selected the forum and has filed first, his right to try his case in that court is not to be lightly dismissed.

The priority principle is held to apply where a federal and state court have concurrent jurisdiction and the action is *in rem*. *See* Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 55 S.Ct. 386, 79 L.Ed. 850 (1935); Kline v. Burke Constr. Co., 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226 (1922); Palmer v. Texas, 212 U.S. 118, 29 S.Ct. 230, 53 L.Ed. 435 (1909); Byers v. McAuley, 149 U.S. 608, 13 S.Ct. 906, 37 L.Ed. 867 (1893); Gay v. Brierfield Coal & I. Co., 94 Ala. 303, 11 So. 353 (1891); Crosby v. Spear, 98 Me. 542, 57 A. 881 (1904); Rogers & B. Hardware Co. v. Cleveland Bldg. Co., 132 Mo. 442, 34 S.W. 57 (1896); 20 Am.Jur.2d, Vol. 20 § 135, p. 485. And so the priority factor is entitled to be weighed in the abstention scale.

D. *Effect on Abstention of United States as Plaintiff*

We next consider (on the decision to abstain) the effect of the presence of the United States as a party plaintiff in the action. There is a dearth of authoritative case law

bearing directly on the point. The most helpful decision is that of the Supreme Court in Leiter Minerals v. United States, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957). The essential issue in that case was whether the United States owned minerals on lands, the surface of which it owned. A private party had claimed the minerals in a state court action against the lessee of the United States. Thereupon, the United States filed an action in the United States District Court for the Eastern District of Louisiana. It sought to quiet title and to enjoin the adverse claimant in state court from prosecuting its action. The section of the Judicial Code which prohibits injunctions against State Court actions, 22 U.S.C. § 2283, was interposed. But the Supreme Court held that it was inapplicable to the United States when it was the suitor. In reaching this result the statute was ruled to be ambiguous and not susceptible to imputing congressional intent to make it applicable to the United States.[4] The Court went on to hold that it was proper for the District Court to entertain the suit in the federal court ". . . and to prevent the effectuation of state

[4] The reasoning of the Court was:

> There is, however, a persuasive reason why the federal court's power to stay state court proceedings might have been restricted when a private party was seeking the stay but not when the United States was seeking similar relief. The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283, 28 U.S.C.A. § 2283, would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283, 28 U.S.C.A. § 2283, alone.

352 U.S. at 225-226, 77 S.Ct. at 290-291.

court proceedings that might conflict with the ultimate federal court judgment." The Court's prior decision in United States v. Bank of New York & Trust Co., 296 U.S. 463, 56 S.Ct. 343, 80 L.Ed. 331 (1936) in which an injunction had been denied, notwithstanding the presence of the United States as a party, was distinguished on its facts. There, it was pointed out, the United States was one of many claimants to a fund and was not different from any other litigant. However, in treating the United States differently in *Leiter* it was emphasized that the policy (of exempting the United States from the anti-injunction statute) is more compelling where the United States seeks to advance a national interest.[5]

The presence of the United States as a plaintiff seeking to establish rights which have a national and sovereign character is then a factor which militates strongly against the applicability of abstention.

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[5] The opinion distinguishes the situation where the United States is "like any private claimant":

> Moreover, the Bank of New York case presented the more unusual situation where the United States, like any private claimant, made a claim against funds that it never possessed and that were in the hands of depositaries appointed by the state court. In this case, a private party is seeking by a state proceeding to obtain property currently in the hands of persons holding under the United States; the United States is seeking to protect that possession and quiet title by a federal court proceeding. Therefore, since the position of the United States is essentially a defensive one, we think that it should be permitted to choose the forum in this case, even though the state litigation has the elements of an action characterized as *quasi in rem*. We therefore hold that the District Court properly exercised its jurisdiction to entertain the suit in the federal court and to prevent the effectuation of state court proceedings that might conflict with the ultimate federal court judgment.

352 U.S. at 227-228, 77 S.Ct. at 292.

Finally, counsel for the appellees urge that the Supreme Court's decision in United States v. District Ct., County of Eagle, Colo., 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971) justifies the trial court's decision to abstain. We have carefully considered this case and we are of the view that it does not consider the problem which is presented in the case at bar. The United States there sought through writ of prohibition in the Colorado Supreme Court to prevent the District Court for Eagle County, Colorado, from asserting jurisdiction over it. This effort failed, but this case did not suggest a lack of jurisdiction of the federal district court in a suit instituted by the United States. Nor did it hold that the state court by virtue of § 666 had exclusive jurisdiction. Further, it did not hold nor even suggest that abstention by a federal court, the jurisdiction of which had been invoked, should be ordered.[6]

The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with the views expressed herein.

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[6] The Court was careful to note that reserved water rights of the United States "are federal questions which, if preserved, can be reviewed here after final judgment by the Colorado court." 401 U.S. at 526, 91 S.Ct. a 1003.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

C-4497—Civil Action

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AKIN, MARY, ET AL., *Defendants*.

Order

The Court's Bench Ruling on the 21st day of June, 1973 shall constitute the Order and Ruling in this action.

No additional Order will be entered.

DATED at Denver, Colorado, this 20 day of July, 1973.

BY THE COURT:

SHERMAN G. FINESILVER, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. C-4497

Reporter's Transcript of Court's Ruling

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PROCEEDINGS:

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The Court: The Court is considering this matter as a Motion to Dismiss. The Court has been favored with very extensive briefs on the legal issues and the respective contentions. As this Court sees the posture of this case, this is a civil action filed by the United States in order to have its rights and the rights of the Ute Mountain Ute and the Southern Ute Indian tribe in and to the waters of the Mancos, the La Plata Animas, Florida, Los Pinos, Piedra, Navajo, and San Juan Rivers and waters tributary thereto in the State of Colorado determined and declared. The jurisdiction of this Court is invoked under 1345 of Title 28 of the United States Code. The action lists between a thousand and fifteen hundred defendants in the case depending on what time of day you make the counting and to what degree you figure some of the names. The defendants also include other unknown claimants of interest to the water in these rivers and tributaries.

• • •

The Court: This matter comes before the Court on the Motions to Dismiss or Reconsider in regard to—as filed by the defendants or intervenors in this case. Particularly, the defendants contest the jurisdiction of this Court to entertain the instant action and in any event, the defendants submit in general that the federal government should be compelled to proceed with this action in Division 7 of the state court or in the state courts.

The jurisdiction of this Court is purportedly invoked under Section 1345 of Title 28 United States Code. The plaintiff views this action as a suit in which the United States seeks to have its rights and concomitant priorities and the rights of the Ute Mountain Ute and the Southern Ute Indian tribes in and to the use of certain waters in the State of Colorado determined and declared.

The water in question is situate in the State of Colorado as described. At this time there are approximately 1,200 named defendants in this suit.

The Court views the following as the applicable law and statutes. First, the McCarran Amendment passed in 1952 designated as 43 United States Code Section 666 which provides for the joinder of the United States in a state court suit for the adjudication of water rights. Further the Water Rights Determination and Administration Act of 1969, Colorado Revised Statute 1963, Section 148-21-1 and other sections which provides a system for the adjudication of the waters of the natural streams in the State of Colorado. Also of considerable import is the case of *United States* v. *Eagle County,* 458 P.2d 760, 169 Colo. 555 which was affirmed by the United States Court, 401 United States 520, 91 S.Ct. 998, 28 L.Ed. 2d 278. Also the companuion case, *United States* v. *District Court in and for Division No. 5,* 401 U.S. 527.

A pivotal issue involved herein and one which is worthy of comment is the McCarran Amendment and its underlying intent coupled with the decision of the Supreme Court in the Eagle County case determined that the adjudication of such matters, that is, rights of the United States to the use of state waters, is solely a matter of state jurisdiction to the exclusion of the federal courts. This issue of jurisdictional exclusivity was not decided in the Eagle County case in the opinion of this Court or its companion case. Rather as we view these two authorities, the state court had jurisdiction under the McCarran Amendment and that

43 United States Code Section 666 (a) is an all-inclusive statutory provision that subjects to general adjudication in state proceedings all rights of the United States to water within the particular state's jurisdiction regardless of how the rights were acquired.

However, the nature and posture of this suit in the view of the Court does not necessitate that this Court make a determination as to the exclusiveness of jurisdiction of this matter. Rather the Court finds that the State of Colorado has a well-defined, workable system for adjudication of water rights of all claimants; that the United States is not immune from suit in the state courts and the United States, as it is presently doing in other water rights suits in the state courts of Colorado, apparently the United States has filed claims in Divisions 4, 5 and 6, should initiate action in the appropriate state court.

Further the Court also notes that the United States has either been served or is in the process of being served in Water Division 7, the district in which adjudication of the instant rights are located.

Although the intention of the McCarran Amendment and the Supreme Court decisions on the matter of exclusive jurisdiction are not manifestly clear, they nonetheless point out to our satisfaction that deferral of jurisdiction to state courts is justified when, as a practical matter, retention of federal jurisdiction on some claims would result in a piecemeal solution of a larger problem.

The Court perceives a practical approach in this case. Aside from the strict legal interpretations, the Court envisions that a practical approach must recognize that we would be creating a dual system of administration and decrees of water rights and potentially could require water users needlessly to readjudicate rights already decreed under state law. These water users have proximity to state courts and from a distance factor alone, there are

practical impediments to requiring everyone in this particular area to litigate the matter in the federal courts.

Further the Court is satisfied from a practical approach that this would be perhaps an unreasonable burden placed upon the citizens of Colorado and in attempting to locate individual water rights that the forums that are established through the state are recognized as a workable network of administration with considerable expertise under a body of state law that has been a hundred years in development and perhaps the system of priorities and propositions runs parallel to the history of the state and in fact is engrained in the Colorado Constitution. The court can see no practical argument in having or persuasive argument in having another forum exercise jurisdiction.

The question that has also been presented is that perhaps the federal courts are best equipped to interpret and adjudicate federal law. However, we are satisfied that the federal courts are not the only forums under the obligation to enforce federal law. In our opinion, we should entertain jurisdiction only after the state court with its well defined expertise and considerable embodiment of law over the years, have had the opportunity to address itself to the issues inherent in this litigation. We have the question of comity between the courts. This is intertwined with the question of abstention. As we view it, comity is based on the discussion that the state can adequately vindicate federal rights and when this assumption proves incorrect, the federal courts may then act in a proper case and under applicable constitutional and federal law.

The Court for a totality of the reasons expressed under the doctrine of abstention or by comity in recognition of the presence of applicable and workable state law, we are of the view the state forum can fully and adequately adjudicate the issues in this litigation, be they the national forests, the indian tribes or any other individual litigants.

To this end the Court is granting the defendants' Motion to Dismiss.

The Court reserves unto itself discretion and jurisdiction to enlarge this opinion in this bench ruling as necessary within the perod of 30 days and no appeal peroid will commence running until the end of that period. So it will not be necessary for the plaintiff, United States, in this case to file any Notice of Appeal. The Court will reserve unto itself a 30 days period in which to enlarge or modify this opinion. This does not mean that the Court, in fact, will do so. However, the Court will not consider this as a final judgment during this 30 day period.

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(Court in recess.)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil No. 4497

Complaint

UNITED STATES OF AMERICA, *Plaintiff*,

v.

Akin, Mary; Albright, Louis N.; Alexander, Clara; Allen, Whetsel; Ames, Margaret; Anderson, Luther; Anderson, Ralph; Anesi, Edith; Anesi, Louisa; Animas Consolidated Ditch Company; Animas Valley Ditch Company; Anixter, William R.; Annala, Roy L.; Archuleta, L. M.; Arizona Columbine Ranch, Inc.; Armstrong, Charles H.; Arny, Julian; Askins, H. Harry & Lillian Andrews; Aspen Springs Development Company; Aspen Trails Development Corporation; Aten, William & Ladeane; Atkinson, D. L.; Audas, W. L.;

Babcock, Kenneth; Bader, Clay; Baird, Brant; Baker, Mary; Baker, Mrs. Jack; Ball, W. P.; Bankston, Neil M.;

Balligu, Robert; Barclay, George & Veva E.; Barker, Earl, Jr.; Barker, Jentra J.; Barnes, Lloyd; Barnes, Pearl P.; Barnes, R. H.; Barnes, Holly G.; Pearl Barnes & Sons; Barr, Robert & Roberta; Barrett, Castle; Barrow, Hence; Bartel, Roland; Bauer, William; Beaty, John & Abenecio Munoz; Becay, Frank J. & Adeline J.; Bedford, Marie; Beebe, Gary; Beggrow, David R.; Beggrow, Dennis K.; Beggrow, William R.; Beighley, Harold V.; Belmear, Stanley T. & Elizabeth L.; Bement, Robert E. & Thelma F.; Bennet, Mabel; Benton, Jay M. & Alice H.; Berg, J. T.; Berryhill, Duane; Bettis, Willis; Bevten, Alta M.; Big Stick Ditch Company; Bigbee Brothers Cattle Company; Bingham, Elbert J. & Ruth A.; Bingham, Percy; Birdsill, Dottie J.; Bishop Brothers; Bixler, Charles A.; Blackmer, Fred C. & Helen M.; Blackmer, Pat; Blair, Frank; Blanding, Charles F.; Bloomfield, J. Vernon; Boclochoe, L. D.; Bodo, Michael; Bond, Tarlton; Bonds, R. V., Jr.; Bonds, Russell; Bowman, Willard O.; Bradford, Bryon; Bradshaw, Dean; Bradshaw, H.D.; Bramwell, Carl; Bramwell, Edwin; Brewer, Lester C.; Bridgewater, James & Cecilia; Brown, Antonio J.; Brown, George; Brown, Hazel; Brown, J. C.; Brown, Joe; Brown, Marvin C.; Brown, Naomi Carter; Brown, Raymond T.; Brown, Roy; Brown, Warren J.; Brixey, J. A.; Bryan, F. W.; Burkhard, Merton, Burkhard, Morton; Burnham, Clinton; Bernett Construction Company; Butler, Byron C.; Butler, Leona Easter; Bynum, James;

Caddy, Glenn; Calco Mining; Calhoun, Clarence; Calloway, Sam; Calvin, Ross, Jr.; Campbell, Charlie; Candelaria, Ed; Candelaria, Isiah; Candelaria, Sam; Carleno, Donald L.; Carmody, H. C., Inc.; Carpenter, G. R.; Carpenter, N. E.; Carver, John; Catchpole, Harvey; Caulk, Garland; Chapman, Vincent P. & Linda J.; Charles, Carroll; Chavez, Adolph; Chavez, Ben; Chavez, Dan; Chromo Mercantile; Chromo Ranches, Inc.; City of Dove Creek; City of Durango; City of Rico; Cladwell, E. H.; Clark, Emilie; Clark, Henry B.; Clark, Rosamond B.; Claude Decker Subdivision; Clever, Don W. & Viola G.; Cline, Fred; Cloman, James; Cogburn, Blanton & Lucille E.; Cogburn, D. F.; Cogburn, Foy; Colbert, Tom; Colescott, Ralph R. & Llyn P.; Collier, Burlson; Colorado Game & Fish Commission; Colorado Land Management; Comisky, Doris D.; Comyford, Carl F.; Connelley, Ruben; Conrad, Walter; Constant, Jack A.; Cook, Joseph D., Jr.; Cook, Willie M.; Cooper, Charlie B. & Bernice F.; Cooper, Howard; Cooper, Ted; Coppinger, R. B.; Corbett, Allison; Cordalis, James T.; Cordova, Marion; Cortez Cattle Company; Cotten, John E.; Cotten, Patrick C.; Couch, Derrel L. & Rosemary; Cox, Ira; Cox, Lee; Craig, Grace; Craig, Kenneth; Crawford, Allen; Crawford, Gwendolyn B.; Cresto, T. A.; Crow, A. M.; Crowley, Bernice; Crowley, Irwin R.; Crowley, Olen; Cugini, Duane; Currie, A. B.;

D. & R. G. W. Railroad; Dalabetta, Angelo; Dale, Marvin; Dale, W. W.; Daniels, Clyde L.; Dannels, Edith A.; Daniel, Eldridge B. a/k/a E. B. Daniel & Lenoria Daniel; Daulton Sealey Cattle Co.; Daulton, Glenn; Daulton, Mrs. Ted; David, George; Davies, Charles; Davis, Clarence; Davis, Phillip; Decker, Bill; Decker, Claude A.; Deering, Claude; Delzell, Robert W.; Denny, A. Wayne; Dickens, M. R.; District 30; Dittmar, Joseph E.; Dixilyn Corporation; Dobbins, Arthur; Dobbins, Hall; Dobbins, Jacqueline; Doerfer, Lloyd; Dolese, Mrs. Roger; Dorsett, Alton; Dove Creek, City of; Dowler, Alton D.; Doyle, Gwynevere Marrs & Nell; Dugger, Wayne; Dunagan, Illamae; Duncan, Raymond T.; Dunlap, Wesley V. & Elizabeth H.; Dunnagan, Ila Mae; Dunsworth Cabin Sites, Durango Ski Corporation;

Eaklor, Harry & Winona C.; Ealum, Ury L. & Betty Jo; Easter, L. B. & Cheryl H.; Eaton International Corporation; Echo Ditch Company; Eddie, Clifford; Eddy, J. T.; Edmonson, Elizabeth; Edwards, Roger W. & Rose A.; Eggleston, T. W.; Ellis, Darrel; Ellis, Vernon; El Paso Gas Company; Elkins, Mark; Englehart, Charles D.;

Englehart, Cordia; Engler, Harry; English, Leroy; Eoff, W. S. & Zoe L.; Erwin, Paul R.; Evans, Emmit B.; Evarts, Kathryn Russell; Everett, Larry; Everett, Leroy;

Fair Field Farms, Inc.; Farrow, Wayne; Fassett, Bruce; Fassett, Delwin; Faverino, Mike; Feazel, Betty; Feazel, Elizabeth T.; Fellers, C. C. & Dorothea; Fisher, Adrian G. & James C.; Fitzhugh, Alvin C.; Fletcher, A. R.; Florida Canal Enlargement Company; Florida River Estates; Florida Water Conservative District; Ford, Thomas R.; Ford, Tom; Folsom, Wade C. & Pearl G.; Forest, Melvin; Formwalt, Hood; Frahn, Alfred; Fraley, B. J.; Frame, Ross; Frazier, Bob; Frazier, J. W.; Fredricks, Arnold; Friend, C. H.; Fritz, Walter G. & Bertha Mae; Frizell, Frank; Frizell, T. J.; Fuches, Harley F.;

Gafford, Douglas D.; Gale, Josephine; Gallegos, Helen; Gallegos, Jose G.; Gallegos, Tom & Margarite Lopez; Galloway, Elynor Sue & Daisy; Gardner, J. T.; Gardner, Jewell; Gardner, Jewell L.; Gardner, Olivia; Gardner, Robert H.; Garnand, Dave; Garrett, Dan; Garrison, Violet; Gawith, Ann; Gawthrop, Lillian; Gawthrop, Rapp; Gibbs, Warren; Gibson, Eldon; Gibson, Irene; Gilliland, Tom; Gilmore, George; Gilmore, Ward; Girard, Louis E.; Girardin, Louis; Gladden, Allie J.; Godfrey, Delmar; Gomez, Chris; Goodman, David; Grace, Mary; Gray, Frank; Green, Houston; Green, Johnie; Greenlee, Howard; Greer, Harry H.; Greer, Lila; Gregg, J. Floyd & Bettie L.; Grevey-Lieberman Inv. Co.; Griffith, Gardner & Stevens; Grimes, B. H. a/k/a Grimes, Bill H.; Grives, J. L.; Grubbs, H.; Grutzmacher, Charles C.; Gurley, C. E.; Guy, Charles;

Haas, Al; Hall, Foster; Halls, Harry; Halverson, Harold; Halverson, Leslie; Hamblin, Kenneth M.; Hamilton, W. E.; Hampton, Edward B. & Rose E.; Hand, Robert; Hanning, Ollie; Happy Scenes Water System; Hare, Alex; Harmon, Fred; Harris, C. C.; Harris, David A.; Harris, Don; Harris, Donald; Haun, M. D. & Maggie Lee; Hawkins,

Herbert; Hayes, John T. & Belle M.; Haynie, Ralph; Haynie, Delph V.; Hays, John; Hays, U. J.; Henderson, R. J.; Henes, Walter; Henshaw, Wesley; Herschy; Hess, Lloyd; Hesselgrave, Robert M.; Hetherton, Jack; Hicks, James; Higgins, Allen Denton; Highfill, Robert W.; Hillen, Mollie A. & Roger H.; Hillyer, Oswen N. & Violet M.; Hinger, Charles C.; Hoff, Emo Gene; Holaday, Carl D.; Holgate, Merle; Holton, Walter B.; Holzraf, Conrad; Hood, Louis; Hopper, Hazel M.; Hott, Daily; Hott, R. D.; Hotter, Joe; Hughes, Beverly; Hughes, Bill; Hughes Brothers; Hughes, Chas. J.; Hughes, Jack (Estate); Hughes, John; Huntington, C. W.; Huntington, Lawrence; Hurt, Oliver; Hutchinson, E. L.; Hyde, Bert; Hyde, Leola; Hyde, Wade H.; Hyder & Hyder Ranch;

Isgar, Arthur; Ismay, Eugene; Ismay, John;

Jackson, Charles E.; Jackson, William F.; James, David; Jaques, Manuel M.; Jarvis, J. W. (Estate); Jarvis, Marion H.; Jarvis Estate; Jasper, Davden; Jeckel, H. M.; Jeffrey, Dorothy H. & Stephen J.; Jenkins, Marion E. & Louise M.; Johnson, Charles; Johnson, Curtis; Johnson, Cy; Johnson, Eugene; Johnson, Robert A.; Jones, Chris H. & Effie; Jones, James; Jones, Robert F. & Dorothy May; Joyner, Jerry L. & Helen I.; Jutten, John; Jutten, W. W.;

Kahn, William; Keahey, P. F.; Keane, Johnny; Keeler, Rex; Keen, William L. S. & Mildred C.; Kelly, Pauline; Kenagy, Paul E.; Kern Acre Real Estate; Kerr, John; Kikel, Joe; King, Arthur; Kine, Ed; King, John; Kingery, C. A.; Kleckner, Carl; Knowlton, Henry; Knuckles, Glen; Knutson, D. C.; Koenig, Carl; Koenig, Ruby K.; Kolz, Alvin; Koshak, Stanley; Kroeger, Jack; Kroulik, Charles; Kruger, John; Kruger, N. J.; Kuenzler, William; Kugle, Kris F.; Kuhlman, Gordon;

Lake, Lawrence; Lancaster, Perry; Lapp, Conrad; Las Tres Piedras, Inc.; Laws, Henry & Leatha; Lechner, Erwin; Lechner, Ervin; Lechner, Irwin A.; Lechner, John;

Lechner, Joseph A.; Lee, Brice F.; Leigh, Royal Archie; Leighton, Robert; Leister, D. B.; Lemon, Charles; Lenard, Joseph; Leonard, Cathryine R.; Leonard, M. H.; Le Platt, H. J.; Lewis, Loyd; Lichliter, Roy; Light, Arthur E.; Lincoln, Francis; Linger, Earl O.; Linsey, Lester; Lippert, Robert; Little Navajo Diversion Canal Co.; Little, Scott, Mrs.; Lohr, Edward G.; Long, J. Kenneth & Elanor J.; Longenbauch, Harry; Longengaugh, H. H.; Longengauch, Robert L.; Lopez, Margarite; Los Pinos Irrigation Ditch Company; Lucero, Joe; Luchini Ranch; Luchini, Louis; Ludwig, Frank, Jr.; Lukas, Robert L.; Lunt, Wayne J.; Lynn, William P.;

M. V. I. D.; Macht, H. Ray; Mackey, Stewart B.; Macy, Tilton; Majors, Donald K.; Mancos Water Cons. Dist.; Marach, L. H. & May E.; Marcact Investment; March, Willard; Martinez, Eugene; Martinez, Fred J.; Martinez, Jesus; Martinez, Jesus M.; Martinez, Manuel E. & Lydia; Martinez, Mel; Martinez, Reynel; Martinez, Victoria G.; Masanz, Paul J. & Jean L.; Masco Brothers; Masco, Charles; Masco, John; Masanz, Paul; Mason, Isabel; Mayfield, James F.; McAfee, Bruce; McCaleb, Joe; McCabe, Vance; McCall, Charlie; McCall, Charles R. & Hazel; McCarthy, Daniel; McCaw, Robert; McCaw, Leroy; McClain; McClure, Don; McConaty, Beverly Brown Hughes; McCormick, Robert; McCoy, Clarence; McEwen, Leucian; McEwen, Noel & Mary J.; McGilvray, M. W.; McInnes, Lewis & Vera M.; McIntyre, W. Fred; McNamara, John; Mekar, Junnie L.; Melvin, C. L.; Menaldino, Victor; Merger Mining & Milling; Mesa Verde Company; Messinger, Wester & Vester; Meyer, Otto & Alma; Michels, Wilford; Mignerey, Lester L., Sr.; Mignerey, Lester L., Jr.; Mignerey, Arthur C.; Millard, Arthur; Millard, Mary Jane; Miller Brothers; Miller, J. T.; Miller, Jesse; Miller, John; Milo, Hanstedt; Minor, Harmon; Minor, H. E.; Minor, H. E., Jr.; Miser, Martin; Mod Dairy, Inc.; Mohar, Jennie Lee; Montezuma Plywood Co.; Montezuma Valley

Irrigation Company; Montezuma Water Company; Montoya, Louis; Montoya, Modesto; Montroy, Leon; Morgan, Jean; Morris, Vincent; Morrison Consolidated Ditch Co.; Munoz, Abenecio; Munoz, Daniel; Munyon, William L. & Jona A.; Mustian, Dorthea; Myers, Ron;

Nanna, Sylvester M.; Necchi, John; Nelson, Charles; New Mexico Game & Fish; Newbold, Jack; Newbold, Jack G.; Newton, Mrs. Horace; Nickles Brothers; Nielson, Dick; Neilson, G. L.; Noland, Owen & Gertrude; Nord, Warren E. & Myrtle S.; Norton, James;

O'Brien, Eva; O'Brien, Robert W.; O'Brien, Rosemary; Oliver, Troy; Ortiz, Bill; Ortiz, Modesto; Oseola Metals Corporation; Osterhoudt, Walter & Gretchen; Overstay, Robert; Owens, Emmit & Lillie May; Oxley, Grant;

Palmer, S. B.; Pargin Brothers; Parks, Grace; Parmley, D. E.; Parmley, Harry; Patten, James S. & Margaret E.; Patten, Meredith Lynn; Patterson, Ross D. & Betty J.; Paulek, Debs; Paulek, Grant; Paulek, Margurite; Paulek, V. A.; Paxton, George; Pecis, Fred; Peck, Jack D.; Penn, William; Penny, Norris R.; Perez, Gloria; Perkins, Calvin J.; Periman, R. T.; Perry Barnes & Sons; Peterson, Jack; Petry, Albert; Phelps, J. W., Jr.; Piccoli, Tony; Picker, George B. & Maxine S.; Pierce, Arthur; Pinckert, Robert L.; Pine River Cattle Co.; Pine River-Bayfield Ditch Company; Pine River Irrigation District; Pinckert, Robert; Pittsburg and Midway Coal Mining Company; Plumb, Fred B.; Poma, Victor A. & Ethel I.; Porter, C. C.; Porter, Verna Dell; Potter, Shelly; Price, Hubert; Price, Thomas W. & Pearl; Prickett, Don; Prince, Herbert D. & Hazel L.; Proctor, Robert F. & Phoebe I.;

Quintana, Joe E.; Quintana, Rose B.;

Radcliff, Clarence C. & Lucille; Radcliff, Harold; Rae, Irene; Ragsdale, John F.; Rainwater, Carl; Ralls, Roy; Randell, Dell; Randolph, Emery, Jr.; Rea, Earl; Rea, Paul Sidney & Irene M.; Read, Max; Red Mesa Reservoir

& Ditch Company; Reddert, F. E.; Reddert, Lee; Redman, Elmer & Pauline; Reed, Max; Reeder, Charles; Reibsomer, Mildred; Retherford, Roy J.; Reynolds, R. J.; Ricca, Bernard; Richards Inc.; Ridley, William, Rietveld, William & Marion Louise; Riffey, Arnold; Riggot, Harold; Ritter, John W. & Maurice T.; Robb, Arlo T.; Robbins, Clarence; Robbins, Ralph; Robinson, Fred B. & Velma; Roberson, R. L.; Roberts, Gene; Roberts, Lee M.; Roberts, Leighton G. & Jo Estelle; Roberts, Leo M. & Constance C.; Roberts, W. W.; Robinson, Blue; Robinson, Ronald; Roelfs, E. R.; Rogers, Charlie M.; Rogers, Wayne; Roscio Brothers; Rose, Troy & Ione; Roundy, Elbert; Rowe, William; Rudd, Clayton; Runyan, Charles E.; Ryberg, William;

Safely, Martin P.; Salmon, Joe; Sambrite Cattle Co.; San Juan Branch Exp. Station; San Juan River Land Development Company; San Juan River Resort, Inc.; Sanderson, Loran; Sandford, Thomas A.; Saunders, Roy H.; Savidge, Robert B. & Margaret E.; Sayles, Phillip A.; Schaffenacker, Austin W.; Schaffer, Roscoe; Schick, Gene; School District 11 Joint; Schmitt, John; Schroeder, P. H.; Schutz, Harold; Scott, R. G.; Scott, Sandy; Self, Raymond G.; Seal, Ben; Searle, Ed; Semler, Paul G.; Semler, W. E.; Shahan, George; Sheek, Clyde; Sheperd, Roy; Shepperd, Sidney; Sherritt, Paul H.; Sherwood, Pat; Sherwood, Patricia A.; Shillingburg, Mrs. Condon G.; Shober, Joe F. & Grace V.; Shock, Lawrence, J.; Short, George; Short, Lester A. & Kathryn; Short, Merl; Short, Neil; Short, Oran W. & Vera S.; Short, W. Alva; Shull, Ethel; Shultz, H. R.; Shunway, Charles; Shuster, Robert; Shwan, Joe; Silliman, Doyl; Simmons, John L.; Sisson, Ruby; Sittner, E. O.; Slade, F. B.; Smith, Allen; Smith, Dale & Carolyn; Smith, Mark; Snow, Nellie; Snyder, Charles; Snyder, Robert L.; South Durango Water District, Southwest Properties, Inc.; Southwestern Water Conservation District; S. W. Water Conservancy Board;

S. W. Water Conservancy District; Sowers, Fred E., Speer, W. E.; Spencer, Olen; Sponsel, George; Springer, Harold A. & Ruth; Spurlock, Pat; Stall, Earl; Standard Metals Corporation; State Board of Agriculture; State of Colorado Division of Fish, Game & Parks; Stephens Development & Management Corp.; Steward, Chistery; Stewart, Wayne; Stinson, Jim; Stocker, Harold Edward & Barbara J.; Stone, Wendell L.; Stovall, Robert; Stratton, Albert; Stricklin, Jack M.; Strobel, Merle; Strobel, Ralph; Suckla, Jim; Sullivan Ditch Company; Summit Irrigation Co.; Summit Reservoir & Irrigation Co.; Sutton, Leslie D.; Swanemyr, Mary; Sylvia, Marjorie A.;

Talamante, Frank; Talley, Dale; Taylor, Catherine; Taylor, Christine; Taylor, Ellis; Taylor, Bob K.; Teal, Frank; Teeson, Mrs. Vada; Tenyck, J. W.; Terrill, Charlie C.; Therioet, Ed; Thomas, Fredrick P. & Nancy E.; Thomas, Mr. & Mrs. Mark; Thomas, Wallace; Thomas, Walter; Thompson, Art & Donna Lee; Thompson, Bert & Helene L.; Thompson, Burt; Thompson, Chester; Thompson, Emily M.; Thompson, Emma; Thompson, Elmer, Thompson, Martha M.; Thompson-Epperson Ditch Company; Tiday, Ronald L.; Tinker, John; Tinker Helen; Tinker, Ruben; Toelle, Frances B.; Toner, Archie B.; Town of Cortez; Town of Dolores; Town of Rico; Town of Silvertown; Tres Piedras, Inc.; Trimble, Garland E.; Trujillo, E. R.; Truelson, Lowell & Olive; Truelson, Val; Turner, Richard W. & Claudine B.; Turner, Richard W., Jr.; Turner, W. B.;

Underwood, R. Lincoln; Union Carbide Corporation; United States Smelting, Mining & Refining; Usher-Prescott Southside;

Valdez, Gilbert; Valdez, Joe G.; Valdez, Jose G. & Juan J.; Vanderville, Emil; Veach, Lillian A.; Velasquez, Abel; Vencil, William & Liar; Villareal, Augustine; Van Feldt, Herbert J.; Vye, Time E.;

Wade, J. H.; Wageman, Robert M.; Wagner, Roy R.; Wagoner, Clarence; Walker, James; Walker, Jimmy; Wallace, Dwight; Wallace, Geraldine; Wallace, Walter; Wampler, Harold E. & Mary A.; Warner, Addison W.; Waters, Robert; Watkins, Robert J. & Ruth F.; Weavel, Harlson; Weaver, C. J.; Weaver, Harlson; Weber Reservoir Company; Weiland, Ernest C.; Weimeyer, Ron; Welding Service & Supply; West, Walter C. & Stella M.; Western Colorado Power Company; Western Construction & Development Company; Weston, Carl R. & Jeanne; Wheat, Don R.; Wheeler, A. L.; Wheeler, Ralph; White, Frances; Whyman, R. G.; Wicker, Elden Z.; Wightman, Howard; Wilburn, Frank; Wiley, Milton; Wilkerson, J. T.; Williams, Alton; Williams, B. F.; Williamson, H. F.; Williams, Susan B.; Wilson, David E.; Wilson, Glen & Mary T.; Wilson, Roberta; Winkler, William; Wolfswinkel, Clifford L.; Wommer Frank; Wommer, Edwin C.; Wood, Rev. J. C.; Wright, Charles A.; Wyman, David M.; Wyman, Daniel; Wynn, E.;

Young, Dale; Young, J. P.; Young, Price Pierce; Young, Agenes Therese;

Zwicker, Eldon;

All unkown claimants of interest to water in the Mancos, La Plata, Animas, Florida, Las Pinos (Pine), Piedra, Navajo and San Juan Rivers and waters tributary thereto in the State of Colorado.

Defendants.

I.

This is a civil action in which the United States seeks to have its rights and the rights of the Ute Mountain Ute and Southern Ute Indian Tribes in and to the use of the waters of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and San Juan Rivers and waters tributary thereto in the State of Colorado, determined and

declared. The jurisdiction of this court is invoked under Section 1345 of Title 28 of the United States Code.

II.

The members of the Ute Mountain Ute Indian Tribe live on the Ute Mountain Ute Reservation, which is located in the southwest corner of the State of Colorado. The present reservation was part of a larger reservation which was withdrawn from the public domain and reserved for the use of said Indian Tribe by the Ute Reservation Treaty of March 2, 1868. When said lands were reserved for Indian use, waters in and on said lands were withdrawn from private appropriation as against the United States and reserved for use of the Indian Tribe. The United States, on behalf of the Ute Mountain Ute Indian Tribe, claims rights in and to the use of the waters of the Mancos and San Juan Rivers and waters tributary thereto in the State of Colorado, located on said reservation; including surface, ground, and underground waters which were unappropriated on March 2, 1868, and which are or will become reasonably necessary for the present and future needs of the Indians in fulfillment of the purposes for which the reservation was created.

III.

The members of the Southern Ute Indian Tribe live on the Southern Ute Reservation which is located in the southwest corner of the State of Colorado. The present reservation was part of a larger reservation which was withdrawn from the public domain and reserved for the use of said Indian Tribe by the Ute Reservation Treaty of March 2, 1868. When said lands were reserved for Indian use, waters in and on said lands were withdrawn from private appropriation as against the United States and reserved for use of the Indian Tribe. The United States, on behalf of the Southern Ute Tribe, claims rights

in and to the use of the waters of the La Plata, Animas, Florida, Los Pinos (Pine), Piedra, San Juan and Navajo Rivers and waters tributary thereto in the State of Colorado, located on said reservation; including surface, ground, and underground waters which were unappropriated on March 2, 1868, and which are or will become reasonably necessary for the present and future needs of the Indians in fulfillment of the purposes for which the reservation was created.

IV.

Mesa Verde National Park is owned by the United States and is located within the watershed of the San Juan River and its tributaries in the State of Colorado. The lands comprising this National Park were reserved for National Park purposes on June 29, 1906, 34 Stat. 616, 617; June 30, 1913; 38 Stat. 83; February 26, 1931, 46 Stat. 1422, and December 23, 1963, 77 Stat. 473. When these lands were reserved, the unappropriated waters in and on said lands were withdrawn from private appropriation as against the United States and were reserved for use by the United States to the extent necessary for the requirements and purposes of said reservation.

V.

The Yucca House National Monument is owned by the United States and located within the watershed of the San Juan River and its tributaries in the State of Colorado. The lands comprising this National Monument were reserved for National Monument purposes on December 19, 1919, by Presidential Proclamation 1549, 41 Stat. 1781. When these lands were reserved, the unappropriated waters in and on said lands were withdrawn from private appropriation as against the United States and were reserved by the United States to the extent necessary for the requirements and purposes of said reservation.

VI.

The Hovenweep National Monument is owned by the United States and located within the watershed of the San Juan River and its tributaries in the State of Colorado. The lands comprising this National Monument were reserved for National Monument purposes on March 2, 1928, by Presidential Proclamation No. 1654, 42 Stat. 2299. When these lands were reserved, the unappropriated waters in and on said lands were withdrawn from private appropriation as against the United States and were reserved for the use by the United States to the extent necessary for the requirements and purposes of said reservation.

VII.

The United States owns certain lands within the watersheds of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and San Juan Rivers and their tributaries in the State of Colorado, which are administered by the Bureau of Land Management in accordance with Executive Orders, Acts of Congress, and rules and regulations promulgated by the Secretary of the Interior. The United States claims the right to the use of waters on these lands to the extent these waters have been used with priority dates as of the dates of initiation of the various uses.

VIII.

The United States claims reserved water rights in and to public waterholes and springs located within the watersheds of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and San Juan Rivers and their tributaries in the State of Colorado, which were reserved for public watering purposes on April 17, 1926, pursuant to the Act of December 29, 1916, 39 Stat. 865, as amended.

IX.

The United States claims a right to the use of waters in hot springs and other waters located within the watersheds of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and San Juan Rivers and water tributary thereto in the State of Colorado, which contain curative properties, and which were withdrawn from private appropriation on July 7, 1930, pursuant to the Act of March 3, 1925, 43 Stat. 1133.

X.

Under authority of the Reclamation Act of June 17, 1902, 32 Stat. 388, Reclamation projects have been initiated within the watersheds of the Los Pinos (Pine), Florida, La Plata, and Animas Rivers, and water tributary thereto, in the State of Colorado. These projects are: Pine River Project, having an initiation date of November 13, 1935; the Lemon Reservoir of the Florida Project, Colorado, having an initiation date of June 10, 1936; the Florida Project Enlargement of the Florida Farmers Ditch, having an initiation date of June 5, 1946; and the Animas-La Plata, Colorado Project, having an initiation date of September 2, 1938. The United States claims priority dates for these projects as of the dates they were initiated as set forth above. The uses claimed include *inter alia;* irrigation, stockwatering, industrial manufacturing, municipal, power generation, piscatorial, recreation, flood and erosion control and wildlife propagation and preservation.

XI.

The United States owns lands in the State of Colorado that comprise the reservation presently known as the San Juan National Forest. These lands were reserved for National Forest purposes by the following: Presidential Proclamation 567, June 3, 1905; Presidential Proclamation 575, June 13, 1905; Presidential Proclamation 736,

March 2, 1907; Presidential Proclamation 737, March 2, 1907; Executive Order 886, July 1, 1908; Executive Order 889, July 1, 1908; Presidential Proclamation 1076; August 15, 1910; Presidential Proclamation 1078, August 15, 1910; Executive Order 3485, June 10, 1921; Presidential Proclamation 1841, July 6, 1928; and Public Land Order of August 19, 1947. When these lands were reserved for National Forest use, the waters in and on said lands were withdrawn from private appropriation as against the United States and were reserved for use on said lands by the United States to the extent necessary for requirements and purposes of the reservation.

XII.

The United States claims rights in and to the use of so much of the waters of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and San Juan Rivers and waters tributary thereto in the State of Colorado, as is or may become necessary for the requirements and purposes of said reservation having priority dates as of the dates of the various acts of Congress, Presidential Proclamations, Executive Orders and Public Land Orders which reserved these National Forest lands.

XIII.

On October 25, 1930, a decree was entered in the case entitled *United States* v. *The Morrison Consolidated Ditch Company, et al.,* Equity No. 7736, in the District Court of the United States for the District of Colorado. This action was a suit, *inter alia,* for an adjudication of certain Indian rights to the use of waters of the Pine (Los Pinos) River in the State of Colorado. It was not, however, a complete stream adjudication. In this adjudication, rights to the use of approximately two hundred twelve (212) second feet of water from the Pine (Los Pinos) River and one (1) second foot of water from Dry

Creek, a tributary of the Pine River, were decreed for use on the Southern Ute Indian Reservation. This water was to be used for "necessary economical and beneficial irrigation and for domestic purposes" for some sixteen-thousand nine-hundred sixty-six (16,966) acres of irrigable land on the "former Southern Ute Reservation," but diversions were not to be in excess of one (1) second foot of water for each eighty (80) acres of land actually being irrigated. No determination was made in said decree as to water rights of the Indians for purposes other than irrigation and domestic uses. No determination was made as to other Federal rights to the use of waters of the Pine (Los Pinos) River. Without a determination by this Court of the legal effects of the Pine River decree upon rights and uses not asserted and not at issue in that action, and not mentioned in that decree, and upon the relative priorities as between decreed rights and rights and uses not covered by the decree, the United States cannot properly determine its rights in and to waters of the Pine River.

XIV.

The defendants and each of them claim rights in or rights to the use of the waters of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and San Juan Rivers and their tributaries in the State of Colorado, which rights are adverse to and jeopardize the rights of the United States and the Ute Mountain Ute and Southern Ute Indian Tribes. All users of the aforementioned waters are necessary parties to this action.

WHEREFORE, Plaintiff prays:

1. That each and all of the defendants be required to appear before this court and set forth fully their claims in and to the use of the waters of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and

San Juan Rivers and waters tributary thereto in the State of Colorado.

2. That the court determine and decree that the United States holds for the benefit of the Ute Mountain Ute Tribe of Indians the right to divert and use so much of the waters of the Mancos and San Juan Rivers and waters tributary thereto in the State of Colorado, located on the Ute Mountain Ute Indian Reservation, as is or may become reasonably necessary for the needs of said Ute Mountain Ute Tribe of Indians, in fulfillment of the purposes for which the reservation was created, and that such right be declared to have a priority date of March 2, 1868.

3. That the court determine and decree that the United States holds for the benefit of the Southern Ute Tribe of Indians the right to divert and use so much of the waters of the La Plata, Animas, Florida, Los Pinos (Pine), Piedra, San Juan and Navajo Rivers, and waters tributary thereto in the State of Colorado, and located on the Southern Ute Indian Reservation as is or may become reasonably necessary for the needs of said Southern Ute Tribe of Indians, in fulfillment of the purpose for which the reservation was created, and that said rights be declared to have a priority date of March 2, 1868.

4. That the court determine and decree that the United States has the right to the use of so much of the waters of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo and San Juan Rivers and waters tributary thereto in the State of Colorado, in and on the San Juan National Forest lands within the watersheds of the aforementioned rivers as is or may become reasonably necessary for the needs and purposes of such National Forest lands, and that such right be declared to have priority dates as of the dates these lands were reserved for National Forest use.

5. That the court determine and decree that the United States has the right to the use of so much of the waters in

the watershed of the San Juan River and its tributaries in the State of Colorado, in and on the lands of Mesa Verde National Park as is or will become reasonably necessary for National Park purposes, with priority dates as of the dates these lands were reserved for National Park purposes.

6. That the court determine and decree that the United States has the right to the use of so much of the waters within the watershed of the San Juan River and its tributaries in and on the lands of the Yucca House National Monument, as is or will become reasonably necessary for National Monument purposes and uses, with a priority date of December 19, 1919.

7. That the court determine and decree that the United States has the right to the use of so much of the waters within the watershed of the San Juan River and its tributaries in the State of Colorado in and on the lands of Hovenweep National Monument, as is or will become reasonably necessary for National Monument purposes and uses, with a priority date of March 22, 1923.

8. That the court determine and decree that the United States has the right to the use of waters within the watersheds of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo and San Juan Rivers and waters tributary thereto in the State of Colorado, on public lands where the waters have heretofore been put to beneficial use on those lands, to the extent of such use, and with priority as of the dates the use of such waters were first initiated.

9. That the court determine and decree that the United States has rights in and to public waterholes and springs located within the watersheds of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo and San Juan Rivers and waters tributary thereto in the State of Colorado, which were reserved for public watering

purposes on April 17, 1926, pursuant to the Act of December 29, 1916, 39 Stat. 865, as amended, with a priority date of April 17, 1926.

10. That the court determine and decree that the United States has rights in and to certain hot springs and other waters located within the watersheds of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and San Juan Rivers and waters tributary thereto in the State of Colorado, which contain curative properties, with a priority date of July 7, 1930.

11. That this court confirm the rights of the United States to the use of the waters within the Los Pinos (Pine) River watershed and its tributaries in the State of Colorado for the Pine River Reclamation Project with a priority date of November 13, 1935.

12. That this court confirm the rights of the United States to the use of waters within the Florida River watershed and its tributaries in the State of Colorado, for the Florida Project, Lemon Reservoir with a priority date of June 10, 1936, and for the Florida Project, Enlargement of the Florida Farmers Ditch, having a priority date of June 5, 1946.

13. That this court confirm the rights of the United States to the use of waters within the Animas River and La Plata River watersheds and their tributaries in the State of Colorado, for the Animas-La Plata, Colorado Project with a priority date of September 2, 1938.

14. That the court interpret, determine, and decree the legal effect of the case entitled *United States* v. *Morrison Consolidated Ditch Company, et al.*, Equity No. 7736, in the District Court of the United States for the District of Colorado, decided October 25, 1930.

15. That the court enter its order enjoining all of the diversions and uses of the waters adjudicated herein except

in accordance with the rights and priorities as set forth in the Court's decree.

16. That the court appoint a Water Master to administer the waters adjudicated herein and the respective rights of all users therefrom, all in accordance with the orders and directives of this court.

17. That the court enter such further orders and decrees as may be just and proper for an adjudication of the parties' rights to the use of the waters adjudicated herein.

/s/ Walter Kiechel, Jr.
Walter Kiechel, Jr.
Deputy Assistant
Attorney General
Department of Justice
Washington, D. C.

By: /s/ James L. Treece
United States Attorney

/s/ Kenneth J. Burke
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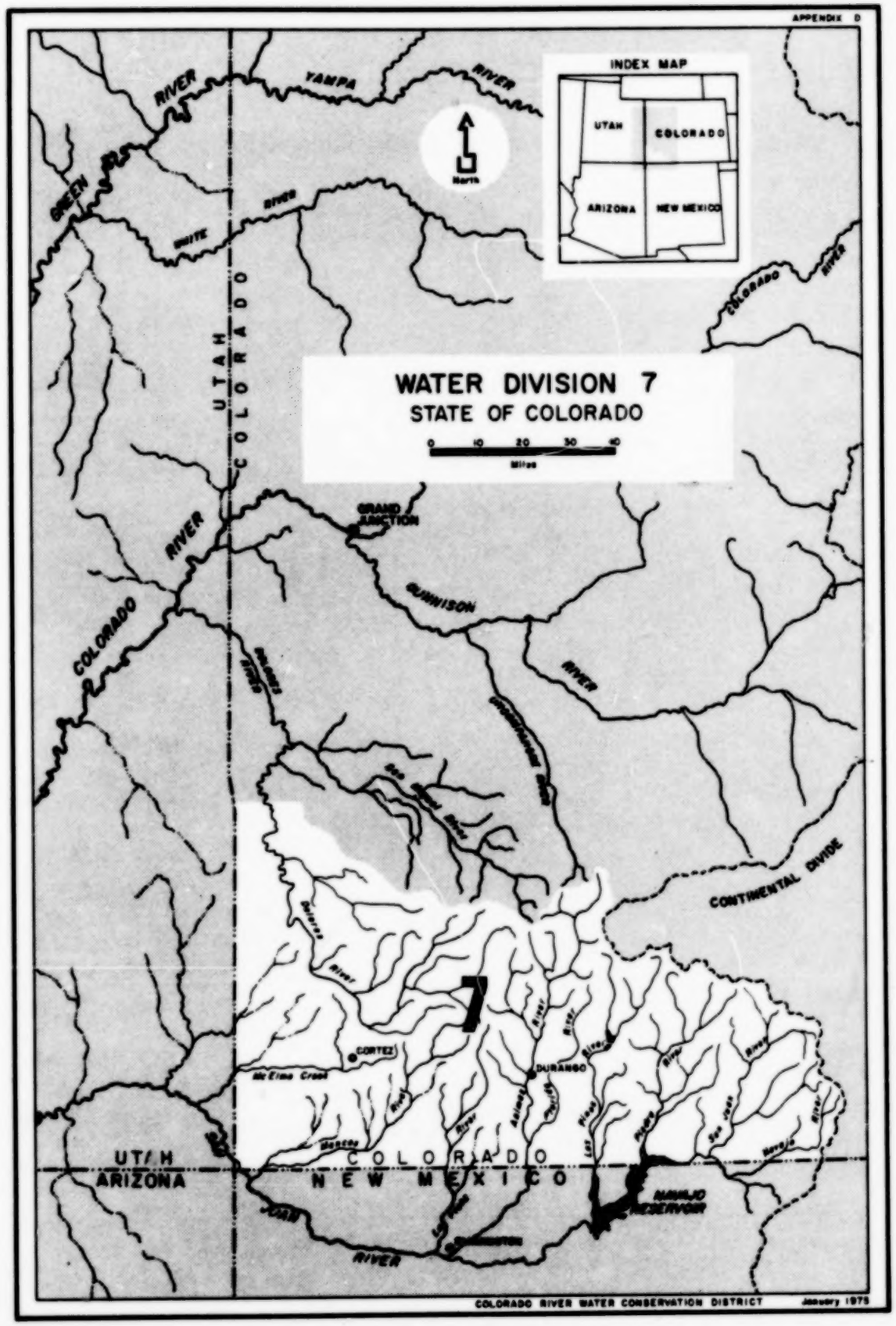
/s/ Donald W. Redd
Donald W. Redd
Attorney
Department of Justice
Washington, D. C

/s/ Gene Alan Erl
Gene Alan Erl
Attorney
Department of Justice
Washington, D. C.



Supreme Court, U. S.
FILED
JUL 11 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-940

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

No. 74-949

MARY AKIN, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONS FOR CERTIORARI FILED JANUARY 30, 1975 AND FEBRUARY 1, 1975

CERTIORARI GRANTED AND CASES CONSOLIDATED APRIL 28, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-940

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

No. 74-949

MARY AKIN, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX

U.S. DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 4497

UNITED STATES OF AMERICA,
Plaintiff

v.

AKIN, MARY, ET AL.,
Defendants

RELEVANT DOCKET ENTRIES

1972

November 14—Complaint

1973

June 21—Judgment

July 20—Order

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Civil Action No. 73-1807

UNITED STATES OF AMERICA,
Plaintiff-Appellant

v.

AKIN, MARY, ET AL.,
Defendants-Appellees

RELEVANT DOCKET ENTRIES

1974

October 2—Opinion

October 10—Revised page 3 of Opinion

October 16—Petition for Rehearing En Banc

October 30—Ex Parte Letter of Supplemental Authority from U.S.

November 12—Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

December 12—Order Recalling and Staying Mandate to January 13, 1975, Pending Certiorari

1975

January 10—Order Granting Further Stay of Mandate to February 9, 1975

IN THE DISTRICT COURT WITHIN AND FOR WATER DIVISION NO. 7
STATE OF COLORADO

IN THE MATTER OF THE APPLICATION OF SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT

MOTION

COMES Now, the Southwestern Colorado Water Conservation District, by its attorney L. W. McDaniel, and moves the Court for an Order requiring the Water Clerk to serve process on the United States of America, pursuant to 43 U.S.C., Section 666, 66 Stat. 560, commonly known as the McCarran Amendment, and as grounds therefore, states and shows as follows:

That the United States of America has recently filed in the District Court of the District of Colorado, Civil Action

No. C-4497, which action affects all the water users in water Division No. 7 of the State of Colorado and that pursuant to the provisions of 148-21-18(3)(c), the United States of America should receive a copy of the resume prepared by the Water Clerk of this Court.

By: /s/ L. W. McDANIEL
L. W. McDaniel
P. O. Box 1157
Durango, Colorado 81301
247-1755

(Caption Omitted in Printing)

ORDER

THIS MATTER, coming before the Court upon the Motion of the Southwestern Colorado Water Conservation District and it appearing to the Court from the Motion and statements of counsel that the United States of America has water claims within Water Division No. 7, State of Colorado, which claims may be affected by the claims of other water users within water Division No. 7.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Water Clerk for Water Division No. 7, State of Colorado is ordered to serve a copy of the resume of all water applications in said water Division No. 7 which have been filed during the month of November, 1972, upon the United States of America pursuant to the provisions of 43 U.S.C., Section 666, and in accordance with the Federal Rules of Civil Procedure, Rule 4(d)(4).

DONE AND SIGNED, this 21st day of December, 1972.

BY THE COURT:

/s/ WILLIAM S. EAKES
Judge

(Caption Omitted in Printing)

CERTIFICATE OF MAILING

I, ELDON KOONTZ, do hereby certify that I am the Clerk for Water Division No. 7, State of Colorado and that on December 22, 1972, I placed in the United States Mail, postage pre-paid, certified mail, return receipt requested, two copies of all the Water Resume Applications in said Water Division No. 7, State of Colorado, filed in my office during the month of November, 1972, directed to Richard G. Kleindienst, Attorney General of the United States, Department of Justice, Constitution Avenue and 10th Street, N.W., Washington, D.C., 20530.

Dated this 22nd day of December, 1972.

/s/ ELDON KOONTZ
Eldon Koontz
Water Clerk

PLAINTIFF
DEFENDANT
TO: ALL PERSONS INTERESTED IN WATER APPLICATIONS IN SAID WATER DIVISION NO. 7
TYPE OF WRIT: Resume

SERVE: United States of America,
AT

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:
Frank E. Maynes
Attorney at Law
115 West 11th St. - P. O. Box 497
Durango, Colo. 81301

Show number of this writ and total number of writs placed in, 1 of 1, 1 of 3 etc.: NO. 1 TOT. 1

CHECK IF APPLICABLE:
XX One copy for U. S. Attorney or delegee and two copies for Attorney General of the U. S. included. Cert.# 220024, RRR

SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.

SPECIAL INSTRUCTIONS:

FILED
IN DISTRICT COURT
WATER DIVISION 7
DURANGO, COLORADO
FEB 16 1973.
Ruby S. Koontz
CLERK

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR: Frank E. Maynes | TELEPHONE NUMBER: 247-1755 | DATE: 12/29/72

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

Show amount of deposit (or applicable code) and sign USM-285 for first writ only if more than one writ submitted. | DEPOSIT/CODE | DIST. OF ORIGIN 13 | DIST. TO SERVE 13 | LOCATION OF SUB-OFFICE OF DIST. TO SERVE

I acknowledge receipt for the total number of writs indicated and for the deposit (if applicable) shown. | SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK: Carrie Helfer | DATE: 12/29/72

☒ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc. at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc. named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (If not shown above): JAMES TREECE U.S. ATTORNEY
☐ A person of suitable age and discretion then residing in the defendant's usual place of abode
ADDRESS (Complete only if different than shown above)
FEE (If applicable): $ 3.00 | MILEAGE: $ --

DATE(S) OF ENDEAVOR (Use Remarks if necessary) | DATE OF SERVICE: 1-3-73 | TIME: 3:30 PM | SIGNATURE OF U. S. MARSHAL OR DEPUTY: J. Marshall

REMARKS

USM-285 (Rev. 7-76)

No. 220024 Certified Mail #7

RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)

SENT TO: Attorney General
STREET AND NO.
P.O. STATE AND ZIP CODE: Wash. D.C.
POSTAGE AND FEES
RETURN RECEIPT SERVICES
1. Shows to whom and date delivered
2. Shows to whom, date and address of delivery
DELIVERED TO ADDRESSEE ONLY
SPECIAL DELIVERY (extra fee required)
POSTMARK OR DATE

PS Form 3800 NO INSURANCE COVERAGE PROVIDED—NOT FOR INTERNATIONAL MAIL (See reverse)

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)
X Show to whom, date and address delivered
☐ Deliver ONLY to addressee

RECEIPT
Received the numbered article described below.
REGISTERED NO. | SIGNATURE OF ADDRESSEE (Must always be obtained)
CERTIFIED NO. 220024
INSURED NO. | SIGNATURE OF ADDRESSEE'S AGENT, if any
by H. Whitmore
DATE DELIVERED | POSTMASTER (Additional fee required)

District Court, Durango, Colorado
State of Colorado
Water Division No. 7
Certified to be a full true and correct copy of original in my custody.
Dated May 8 1974
Clerk Ruby S. Koontz
Deputy

BEST COPY AVAILABLE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 4497

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AKIN, MABY, ET AL., *Defendants*.

MOTION OF THE COLORADO RIVER WATER CONSERVATION DISTRICT TO INTERVENE AS A DEFENDANT

The Colorado River Water Conservation District, with offices in Glenwood Springs, Colorado, moves to intervene as a defendant in this action under F.R.C.P., R. 24, in order to assert a Motion to Dismiss as set out in the proposed Motion to Dismiss attached hereto. In the event the Motion to Dismiss is denied, movant intends to answer and to defend against the claims of the United States deemed prejudicial to movant's rights and claims. As grounds for intervention, movant states:

1. The Colorado River Water Conservation District, hereinafter referred to as "River District", is a public agency established by the Colorado State Legislature in 1937 (Col. Rev. Stat. (1963) ¶¶ 150-7-1 et seq.), comprising all of twelve and parts of three other counties in north-western and west-central Colorado. The River District was formed for the purposes of conserving and developing the waters of the Colorado River and its tributaries within the state of Colorado and within the area of the River District. The headwaters and substantial portions of principal tributaries of the Colorado River, including the Yampa, White and Gunnison Rivers, arise within the geographic area of the River District and traverse the same. The River District believes that the conservation and development of these waters may well be impaired by this action.

2. In 1922, the Colorado river basin states (Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming), with the consent of the Congress of the United States (42 Stat. 171) entered into an interstate compact regarding the division and use of the waters of the Colorado River. Such compact provides, among other things, by Article III(d) that the states of the Upper Division (Colorado, New Mexico, Utah and Wyoming) "will not cause the flow of the river at Lee Ferry (in the compact defined as a measuring point on the Colorado River in Arizona one mile below the mouth of the Paria River) to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years reckoned in containing progressive series . . .". Any curtailment of Upper Division use of water occasioned as a consequence of this provision is referred to herein as the "Lee Ferry call".

3. The River District, pursuant to its statutory powers has been active in the planning and implementation of projects to conserve and develop for beneficial use the waters of such rivers, within its area, frequently in cooperation with the Bureau of Reclamation, Department of the Interior.

4. Included among such projects making beneficial use of water and already constructed within the area of the River District are Colbran, Bostwick Park, Paonia, Silt and Smith Fork Federal Reclamation Projects, and Ruedi Reservoir, a component of the FryingPan-Arkansas Federal Reclamation Project. Additional Federal Reclamation Projects are the West Divide and Dallas Creek Federal Reclamation Projects, authorized for construction by the Colorado River Basin Project Act, 82 Stat. 885 (1968), Fruitland Mesa and Savery-Pothook Federal Reclamation projects authorized for construction by Congress by the

Act of September 2, 1964, 78 Stat. 852, as well as the Upper Gunnision, Bostwick, Lower Yampa, Blue Mesa, Yellow Jacket, Bluestone, Grand Mesa, Upper Yampa, Eagle Divide, and Middle Park proposed Federal Reclamation Projects, concerning which feasibility studies are already completed, in progress or programmed for commencement.

5. Apart from assisting in the furtherance of the federal undertakings, the River District has surveyed and planned and was the claimant of and holds the decrees for a number of additional projects to conserve and develop the waters of the region within the area of the River District, including the Rangely, Redcliff and Snowmass projects, the ultimate construction and operation of which in large measure depend upon when and if a demand is or will be made upon the Upper Division to release waters for the benefit of the Lower Division pursuant to the Colorado River Compact referred to above.

6. Colorado, by its Constitution, has rejected the riparian doctrine with regard to natural streams within the state, and has espoused the doctrine of appropriation (Colo. Const. Art. XVI, 5, 6, *Coffin* v. *Left Hand Ditch Co.*, 6 Colo. 443 (1882)). The latter doctrine recognizes the right to make beneficial use of the waters of natural streams even though the flow of such streams is diminished, such right, in times of shortage, being exercised in order of priority, that is, first in time of use is first in right of use. All of the projects named in paragraphs 4 and 5 of this Motion though senior in priority to some claimed uses within the state are junior in point of time and right to use to 1922 and are therefor subservient to a Lee Ferry call. The River District believes that almost all, if not all, of the projects above referred to will have to, of necessity, curtail in whole or in part their diversions of water for beneficial use within the state of Colorado and the area of the District in the event of a Lee Ferry call for water for the benefit of the states of

the Lower Division under the Colorado River Compact of 1922.

7. The Mancos, LaPlata, Animas, Florida, Los Pinos (Pine), Piedra, San Juan and Navajo Rivers and the waters tributary to such streams, are tributary to the Colorado River upstream from Lee Ferry above referred to, and consequently contribute waters at such measuring point to meet any requirement imposed upon the states of the Upper Division by the above referred to Colorado River Compact of 1922.

8. By its Complaint herein, the United States of America claims title to waters from the tributaries of the Colorado River named in its Complaint with priority dates antedating, in many cases, the priority dates awarded to the projects referred to in paragraphs 4 and 5 of this motion and in unspecified and unquantified amounts. Because of the doctrine of prior appropriation when the Lee Ferry call for water is made, the heretofore recognized rights and claims of the River District and of present users for beneficial purposes within the geographic area of the District, will have to curtail in advance of any limitation of the rights to the use of water claimed by the United States of America in its Complaint herein if the dates of priority claimed by the United States are awarded to it.

9. Such curtailment of the use of water by such projects and users within the geographic area of the District, will cause irreparable harm and injury to the River District and to the water users within the geographic area of the District.

10. The interests of the River District are not fully nor adequately represented by any of the existing parties to this litigation. The River District believes it has an interest such as to entitle it to intervene as of right under F.R.C.P., R. 24(a). If the River District may not intervene as of right, it nonetheless believes its motion presented

herein will not unduly delay or prejudice the prosecution of the Complaint herein, and intervention for the reasons hereinbefore set out should be permitted under F.R.C.P., R. 24(b).

DELANEY & BALCOMB

By: /s/ KENNETH BALCOMB
Kenneth Balcomb
Attorneys for Colorado River Water Conservation District
P. O. Drawer 790
Glenwood Springs, Colorado
81601
303-945-6546

Address of the District:
P.O. Box 1120
Glenwood Springs, Colorado
81601
303-945-8522

(Caption Omitted in Printing)

MOTION TO DISMISS

(Filed February 13, 1973)

The Southeastern Colorado Water Conservancy District (hereinafter referred to as "District") respectfuly moves this Court to dismiss the above and foregoing action as not being cognizable by this Court for the following reasons:

1. This Court is without jurisdiction to hear and determine the subject matter of the allegations in the Complaint.

2. The allegations made in the motion of the District to intervene are incorporated herein by reference as though fully set forth herein.

3. By the Water Rights Determination and Administration Act of 1969, C.R.S. 1963, § 148-21-1, et seq., the State of Colorado established by statute a system for the adjudication of waters of the natural streams in the State of Colorado. Division 7 comprises all lands in the southwestern portion of the State of Colorado, and the San Juan, Piedra, Florida, Las Animas, Los Pinos, LaPlata, Mancos and Dolores Rivers.

4. The United States of America has been made a party to adjudication proceedings now pending in Division 7 relating to all rivers therein, as will appear from Exhibit A hereto attached and hereof made a part. The United States of America is a person within the meaning of said Water Rights Determination and Administration Act. Service on the United States was made pursuant to the McCarran Act, 43 U.S.C. 666.

5. The United States of America now has filed claims in the appropriate state courts in Water Divisions 4, 5 and 6 in Western Colorado for many uses and purposes, which claims are now pending and undisposed of, all thereof being filed pursuant to the McCarran Amendment, 43 U.S.C. 666, and the decision in *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520, and *United States* v. *District Court in and for Water Division No. 5*, 401 U.S. 527.

6. Any and all claims for waters asserted by the United States in this proceeding can and should be claimed in the appropriate state courts of the State of Colorado in Division 7 in the same manner as are being asserted in the state courts in Divisions 4, 5, and 6.

7. This Court should dismiss this action and the United States should initiate its claims in Division 7 pursuant to the Water Rights Determination and Administration Act.

Respectfully presented,

FAIRFIELD AND WOODS

By: /s/ HOWARD K. HOLME
Howard K. Holme
Attorneys for Southeastern Colorado Water Conservancy District
1536 First National Bank Bldg.
Denver, Colorado 80202
Telephone: 534-6135

Address of the District:

P.O. Box 440
Pueblo, Colorado 81002

MAYNES & ANESI
ATTORNEYS AT LAW
115 West Eleventh Street
Durango, Colorado 81301

February 2, 1973

Mr. Charles J. Beise
1536 First National Bank Building
Denver, Colorado 80202

Dear Chuck:

As per our telephone conversation of this date, enclosed please find copy U.S. Marshals Service together with the Receipt for Certified Mail and Receipt for Water Division No. 7.

Very truly yours,

/s/ FRANK E. (SAM) MAYNES
Frank E. (Sam) Maynes

54.792

U.S. MARSHALS SERVICE
INSTRUCTION AND PROCESS RECORD

INSTRUCTIONS: See "INSTRUCTIONS FOR SERVICE OF PROCESS BY THE U.S. MARSHAL" on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.

PLAINTIFF
DEFENDANT
TO: ALL PERSONS INTERESTED IN WATER APPLICATIONS IN SAID WATER DIVISION NO. 7
COURT NUMBER
TYPE OF WRIT: Resume

SERVE: NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN
United States of America,
AT: ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code)

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:
Frank E. Maynes
Attorney at Law
115 West 11th St. - P. O. Box 497
Durango, Colo. 81301

Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 3, etc.: NO. 1 OF TOTAL 1

CHECK IF APPLICABLE:
XX One copy for U. S. Attorney or designee and two copies for Attorney General of the U. S. included. Cert.# 220024, RRR

SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE:

SPECIAL INSTRUCTIONS:

FILED
IN DISTRICT COURT
WATER DIVISION 7
DURANGO, COLORADO
FEB 16 1973.
Ralph E. Woods
CLERK

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR: Frank E. Maynes
TELEPHONE NUMBER: 247-1755
DATE: 12/29/72

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

Show amount of deposit (or applicable code) and sign USM-285 for first writ only if more than one writ submitted.
DEPOSIT/CODE
U.S.T. OF ORIGIN: 13
DISTRICT TO SERVE: 13
LOCATION OF SUB-OFFICE OF DIST. TO SERVE

I acknowledge receipt for the total number of writs indicated and for the deposit (if applicable) shown.
SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK: Carrie Helfer
DATE: 12/29/72

☒ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (If not shown above): JAMES TAFFEE U.S. ATTORNEY
☐ A person of suitable age and discretion then residing in the defendant's usual place of abode.

ADDRESS (Complete only if different than shown above)
FEE (If applicable): $ 3.00
MILEAGE: $ --

DATE(S) OF ENDEAVOR (Use Remarks if necessary)
DATE OF SERVICE: 1-3-73
TIME: 2:34 ☒ AM ☐ PM
SIGNATURE OF U. S. MARSHAL OR DEPUTY: By Marshal Carrie Helfer

REMARKS:

District Court, Durango, Colorado
State of Colorado
Water Division No. 7
C - d to be a full, true and correct copy of original in my custody.
Dated June 8, 1973
Clerk Ralph E. Woods
Deputy

54.792

USM-285 (Rev. 7-1-70)
1. CLERK OF THE COURT

BEST COPY AVAILABLE

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
JUN 11 1973
JAMES R. MANSPEAKER

6

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Office of the Clerk

October 10, 1974

MEMORANDUM TO: ALL RECIPIENTS OF OPINION IN No. 73-1807, U.S.A. v. MARY AKIN, ET AL.

The Court, upon its own motion, has filed a revised page three which should be inserted in lieu of page three of the opinion in the captioned case which was filed October 2, 1974.

Sincerely yours,

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

• • •

United States and on behalf of the Ute Mountain and Southern Ute Indian Tribes on November 14, 1972. It sought the adjudication of all water rights held by the United States in its own right and as trustee for the Ute Mountain and Southern Ute Indian Tribes in the San Juan Basin but, particularly, adjudication of all of its reserved rights in the San Juan River of Colorado. There are approximately 1200 named defendants.

The reserved rights asserted by the United States consist of those used in connection with Mesa Verde National Park, the Yucca House National Monument, the Hovenweep National Monument, Bureau of Reclamation projects within the State of Colorado and lands reserved by the United States in Colorado. On behalf of the Indian tribes the United States claims further reserved rights for use of the Ute Mountain Ute Tribe and the Southern Utes on their reservations. The Colorado River Water Conservation District intervened as a defendant for the purpose of

filing a motion to dismiss. Other intervenors followed including the Southeastern Colorado Water Conservancy District and the Board of Water Commissioners, City and County of Denver.

A subsequent suit was filed on January 3, 1973 in State Court by the Mancos Water Conservation District and the Southeastern Colorado Water Conservancy District embracing similar subject matter.* In this action the plaintiffs sought judicial determination of the identical water rights which the United States sought to have adjudicated. The United States was joined as a defendant in the state action pursuant to the so-called McCarran Amendment, 43 U.S.C. § 666, which allows a joinder of the United States in such a suit in state court.

• • •

---

* It has been called to our attention in an informal letter from one of the attorneys for defendants-appellees that this statement is incorrect. It is said that on that date Southwestern Colorado Water Conservation District filed a motion for the joinder of the United States under the McCarran Act. The record does not reveal the true fact. We note the suggested correction, even though it is not outcome determinative.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 73-1807

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MARY AKIN, et al.,
Defendants-Appellees.

PETITION FOR REHEARING IN BANC

(Filed October 16, 1974)

COME Now the above-named defendants-appellees by and through the Attorney General of the State of Colorado and petitions the United States Court of Appeals for the Tenth Circuit for a rehearing in banc in the above-captioned matter.

ARGUMENT

I.

The Court Misapprehended the True Parameters of the Doctrine of Abstention and Adopted a Constricted and Partial View of the Doctrine.

The doctrine of abstention vests with the federal courts the discretionary authority to decline to entertain issues presented even though the court is possessed with jurisdiction to so determine. The landmark abstention decision is *R.R. Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941). The United States Supreme Court, in reviewing the lower court's determination, which enjoined the Railroad Commission's order, established the initial fundamental principles of the doctrine. Two of those principles are relevant to this case. Firstly, the power to stay or

defer action is to be exercised in furtherance of fostering the harmonious relations between state and federal authorities. Secondly, in the absence of a showing that the state adjudicatory process cannot be pursued with full protection of the claims, the court should exercise its discretion to stay its hand.

The decisions which have followed *Pullman* have given greater breadth to the doctrine of abstention. Of particular note is *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), which is noted in the court's opinion in *United States* v. *Akin*, No. 73-1807, decided October 2, 1974 (hereinafter cited as "*Akin*"), at 11. The *Akin* opinion recognizes that abstention is proper when the federal court action would interfere with a state regulatory scheme but held this principle to be inapplicable to the present case apparently because it characterized the Colorado water right determination and administration procedure as something other than a state administrative regulatory system. *See, Akin* at 11-12. Concededly, the Colorado system of water right determination and administration is primarily judicial. However, this procedure fulfills the same function as schemes in other appropriative states which are more purely administrative and should likewise be held to be within the purview of the *Burford* category.

The rationale behind this particular principle of abstention is to maintain the integrity of a state regulatory scheme—be it an "administrative" or a "judicial" one—and thus enhance federal-state harmony. Surely the principle does not depend upon the technical nature of the regulatory system chosen by the particular state. *Burford* and the other cases in this category cited by the court do not focus upon the specific nature of the state regulatory system. The determinative factor has been simply the existence of an adequate and comprehensive state regulatory system. Colorado has developed over some one hundred years of statehood a regulatory system which has

special and peculiar capabilities to handle the adjudication and administration of water rights. It is submitted that the elimination of the Colorado regulatory scheme from this category of abstention merely because of the judicial character of the Colorado process is erroneous and not supported by the law.

The avoidance of unnecessary interference with state functions is of particular weight when the federal right is "entangled in a skein" of a state regulatory system. *Gay* v. *Board of Registration Comm'rs,* 466 F.2d 879, 884 (1972). On this point, the court erroneously concluded in *Akin* at 15-16 that the decision of the United States Supreme Court in *United States* v. *District Ct., County of Eagle, Colorado,* 401 U.S. 520 (1971) (hereinafter cited as *"Eagle County"*), does not suggest the propriety of abstention in this case. *Eagle County* held that federal water rights, including any reserved water rights, may be integrated into the Colorado water right administration and adjudication system. *Eagle County* and its companion case, *United States* v. *District Court for Div. No. 5,* 401 U.S. 527 (1971) affirmed the Colorado Supreme Court's decision, 169 Colo. 555, 458 P.2d 760 (1969), that the State's regulatory system provides an orderly and competent procedure for determinating and administrating all water rights. The assertion in *Akin* at 14-15 that abstention is less compelling where the United States advances a national interest is undermined by the Supreme Court's declaration that the Colorado system is adequate to hear federal water right claims. It would be contrary to these astute decisions to cast aside the recognized adequacy and efficiency of the State procedure, thereby relegating the important claims of all parties to the nonexistent administrative system of the federal judiciary.

It must be further recognized that the discretion to abstain is properly exercised *solely* to avoid interfering with or disrupting an orderly state system of administration.

Allegheny Airlines, Inc. v. *Pennsylvania Pub. Util. Comm'n,* 465 F.2d 237 (1972), cert. denied 409 U.S. 1010 (1973); *Alabama Pub. Serv. Comm'n.* v. *Southern Ry. Co.,* 341 U.S. 341 (1951). However, in addition to the presence of this compelling factor in *Akin,* a weighing of all the proper factors makes the trial court's discretionary determination unassailable. Among the other more significant factors which decidedly tip the scales to abstention are the following:

1. The adverse impact that assumption of jurisdiction will have on the federal district court docket. *Law of the Federal Courts,* Wright (1970) at 196.
2. The subject matter of the litigation is a unique state resource, the management of which is a matter of great state concern. *Kaiser Steel Corp.* v. *Ranch Co.,* 391 U.S. 593 (1968); *Union Water Supply Corp. of Garciasville* v. *Vaughn,* 355 F. Supp. 211 (1972).
3. The extreme complexity of the subject matter and of the regulatory system, and the expertise and capability of the state system to administrate and adjudicate the subject matter. *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943); *R.R. Comm'n of Texas* v. *Rowan and Nichols Oil Co.,* 311 U.S. 570 (1941).
4. The existence of a pending parallel state case. *P.P.G. Indus.* v. *Continental Oil Co.* (Ct. App. 5th Cir.), No. 72-3148, decided May 9, 1973, 41 L.W. 2619.
5. The national policy of adherence to state law and procedure with regard to the acquisition and administration of water rights by the federal government. *In re Green River Drainage Area,* 147 F. Supp. 127 (1956); *United States* v. *Gerlach Livestock,* 339 U.S. 725 (1950).

Thus, when these factors are balanced against those asserted by the United States of which only their victory in the race to the courthouse and the advancement of a national interest are recognized by the court in *Akin* the

decision of the federal district court to abstain becomes manifestly correct. The pigeonholing approach of categorization of the *Akin* opinion in analyzing the doctrine of abstention results in unwarranted contraction of the doctrine. Abstention rests upon intrinsic tenets of federalism as well as a sound appreciation of the proper functions and relationship of the state and federal judicial systems. Such a significant doctrine of law should not be restricted by division of abstention into stilted classes but rather should be given effect when the weight of the factors urging abstention decidedly outbalances those factors which favor the assumption of jurisdiction.

In essence, the *Akin* decision is an unjustified substitution of opinion. The federal district court decision can be reversed only upon a clear finding of an abuse of discretion by the trial judge and not merely upon a difference of opinion between the Court of Appeals and the district court. The *Akin* opinion is void of any finding of an abuse of discretion; nor can such a finding be properly inferred from the court's opinion. The *Akin* opinion constitutes an impermissible substitution of its judgment for that of the district court.

II.

Comity Is a Proper Basis for the Dismissal of This Action by the Federal District Court

The court's opinion in *Akin* recognized that reasons of comity were a ground upon which the federal court dismissed this action. *Akin* at 4. However, the issue of comity is nowhere else mentioned in the court's opinion. Comity is a well-established, independent, and salutary principle which in and of itself is sufficient ground upon which the district court may repair the parties to state court.

> The word "comity" identifies the concept that federal courts, in the exercise of their jurisdiction, should give consideration to the sovereign status of the individual state. Commonly referred to as a "doctrine", comity is more a policy consideration than a rule of law. That policy consideration, however, underlies the rule established by the Supreme Court that federal courts should abstain to avoid needless conflict of federal jurisdiction with the administration by a state of its own affiairs. *See* Wright, Federal Courts, § 52 (1970). A sound conception of our federal system requires a federal court to withhold intervention with state procedure in the interest of maintaining harmony within the system. State of California v. Oroville-Wyandotte Irr. Dist., 409 F.2d 532 (9th Cir. 1969).
>
> *Dresser Industries, Inc* .v. *Insurance Co. of No. America,* 358 F. Supp. 327, 329 (1973).

Mr. Justice Black re-emphasized the importance of the concept of comity in *Younger* v. *Harris,* 401 U.S. 37, 43 (1970):

> Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts.

Comity then is a sound conception of our federal system which requires a federal court to withhold intervention with state procedure in the interest of maintaining harmony within our nation. *See also, Pub. Serv. Comm'n of Utah* v. *Wycoff Co.,* 344 U.S. 237 (1952); *Commonwealth of Pennsylvania* v. *Williams,* 294 U.S. 176 (1935). Under *Eagle County,* the claims of the United States for water rights lie properly within the state court system. An action was pending pursuant to Colorado's Water Right Determination and Administration Act of 1969 to determine the relative rights of all parties to the San Juan River system (Water Division 7) at the time the United States chose to ignore that appropriate forum and attempted to bifurcate the water right administration procedure by filing its action in the United States District Court. Under

such circumstances, the District Court's policy determination that comity should prevail and the parties should proceed in the state courts should be respected. The absence of any discussion of comity in the *Akin* opinion is clear evidence that the District Court's opinion was not completely reviewed for determination of abuses of discretion but rather was merely replaced by the opinion of the Court of Appeals. If for no other reason, the absence of any discussion of comity is a compelling reason for granting this petition for rehearing in banc.

III.

A Rehearing in Banc Is Appropriate Because of the Significance of This Case.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the United States Court of Appeals for the Tenth Circuit is respectively requested to rehear this matter in banc. Not only are water rights of more than twelve hundred named defendants at stake, but fundamental questions of the doctrine of abstention, comity, and federal-state jurisdiction are in issue. In addition to the impact upon the State of Colorado and the citizens of this State, a decision in this matter has implications across the entire spectrum of federal-state relations. In particular, this case portends potential disruption of the well-developed water right determination and administration systems of all the western states which adhere to the appropriation doctrine of water law. Thus, this case presents a federal-state controversy of great magnitude and involves basic and significant issues that concern the quintessence of federalism. This widespread impact, the significant federal-state questions, and the importance of the ultimate decision to all appropriation states constitute appropriate grounds for an in banc rehearing.

Conclusion

For the foregoing reasons it is respectfully requested that the United States Court of Appeals for the Tenth Circuit rehear this matter in banc.

Respectfully submitted,

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John E. Bush,
Deputy Attorney General
Charles M. Elliott,
Assistant Attorney General
Clyde O. Martz,
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Attorneys for Southeastern Colorado Water Conservancy District

On behalf of all Defendants and Intervenors:

/s/ John E. Bush
John E. Bush
Deputy Attorney General

/s/ Charles M. Elliott
Charles M. Elliott
Assistant Attorney General

(Certificate Omitted in Printing)

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C. 20530

October 25, 1974

90-2-2-167
AIR MAIL
Mr. Howard K. Phillips
Clerk
United States Court of Appeals
Tenth Circuit
Denver, Colorado 80202

Dear Mr. Phillips:

Re: No. 73-1807, United States v. Mary Akin, et al.

This has reference to the case entitled *United States of America* plaintiff-appellant v. *Mary Akin, et al.*, defendants-appellees, No. 73-1807 (D. Colo. No. 4497), in which the decision of the district court to dismiss this action under the doctrine of abstention was reversed and the cause remanded for proceedings consistent with the opinion of the court of appeals. We are in receipt of a copy of a revised page 3 of the opinion in this case. This page is identical to that appearing in the opinion except that the following footnote has been added:

> It has been called to our attention in an informal letter from one of the attorneys for defendants-appellees that this statement is incorrect. It is said that on that date Southwestern Colorado Water Conservation District filed a motion for the joinder of the United States under the McCarran Act. The record does not reveal the true fact. We note the suggested correction, even though it is not outcome determinative.

We agree with the conclusion in the footnote that the question of service and what had transpired with respect to the filing of the respective actions in the state court and the United States District Court are not determinative of the outcome on the appeal filed by the United States. In view,

however, of certain statements by the State of Colorado in its petition for rehearing *in banc*, we suggest that further explanation is appropriate.

Under Colorado law as codified in the Colorado Water Right Determination and Administration Act of 1969, sec. 148-21-1 *et seq.*, there is no provision for a general adjudication suit were all claimants to water rights from a given source are joined in one suit for the judicial determination of their respective rights *inter se*, as is commonly filed in most of the western states where water rights are an important matter of judicial determination. Under Colorado law, an individual files an application for a water right with the Water Clerk of the water division where the water in question is located. Section 148-21-18. A resumé of all applications filed within a given month is prepared by the Clerk and mailed to parties considered to be affected. Protests as to applications may be filed by those contesting them. Copies of applications, protests, etc., may be served as ordered by the Court. As a general rule, no earlier priority date can be recognized by the water court than the year within which the filing was made by the party.

The Supreme Court of the United States has expressly ruled, however, that reserved rights of the United States are governed by federal law and that the true priority date is the date of the reservation. *United States* v. *District Court, County of Eagle, Colorado,* 401 U.S. 520 (1970).

The United States had never been served with any notices of applications for water rights within Water Division No. 7 until January 1973, after Southwest Colorado Water Conservancy District filed a motion for joinder of the United States under the McCarran Act. Until such time as the United States was served and joined as a party to proceedings in the state court those proceedings were not binding upon the United States and they should not adversely affect the prior existing water rights of the

United States. Therefore, it cannot be said that the water rights of the United States were at issue in any state court proceedings until such time as the United States was joined and served in those proceedings. We believe the foregoing should clarify any misunderstanding with respect to the sentence to which the footnote pertains.

Please call this to the attention of the Court and, if this matter is considered important to the outcome of the petition for rehearing *in banc*, we would be happy to brief it in detail if the Court should so desire.

Sincerely,

WALLACE H. JOHNSON
Assistant Attorney General
Land and Natural Resources Division

By: /s/ EDMUND B. CLARK
Edmund B. Clark
Chief, Appellate Section

NOVEMBER TERM—NOVEMBER 12, 1974

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges, and Honorable Talbot Smith, District Judge.*

---

* Sitting by designation.

No. 73-1807

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

v.

AKIN, MARY, ET AL., *Defendants-Appellees.*

SOUTHERN UTE INDIAN TRIBE, ET AL., *Amici Curiae.*

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the Defendants-Appellees in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Hill and Doyle, and District Judge Smith, to whom the case was argued and submitted.

Upon further consideration, the suggestion for rehearing en banc is denied. Judges Holloway and Barrett would grant the suggestion for rehearing en banc.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

NOVEMBER TERM—DECEMBER 12, 1974

Before Honorable Delmas C. Hill and Honorable William E. Doyle, Circuit Judges.

No. 73-1807

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

v.

AKIN, MARY, ET AL., *Defendants-Appellees.*

SOUTHERN UTE INDIAN TRIBE, ET AL., *Amici Curiae.*

This matter comes on for consideration of Defendants-Appellees' motion to stay the mandate in the captioned cause pending petition for writ of certiorari.

Upon consideration whereof, it is ORDERED that the mandate of this Court issued November 20, 1974, be and it is hereby recalled.

It is further ORDERED that the mandate shall be stayed until January 13, 1975, pending certiorari and that if on or before that date there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellees have timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

The Clerk shall forward a certified copy of this Order to the Clerk of the United States District Court for the District of Colorado.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

NOVEMBER TERM — JANUARY 10, 1975

Before The Honorable Delmas C. Hill and The Honorable William E. Doyle, Circuit Judges

No. 73-1807

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

vs.

AKIN, MARY, ET AL., *Defendant-Appellees.*

This matter comes on for consideration of appellees motion for further stay of mandate pending application for a petition for writ of certiorari.

Upon consideration whereof, it is ordered that the mandate is further stayed to and including February 9, 1975, pending timely filing by appellees of a petition for writ of certiorari in the Supreme Court of the United States. If, on or before that date, the Clerk of this Court shall receive notice from the Clerk of the Supreme Court of the United States that a timely petition for writ of certiorari has been filed in that Court, the stay of mandate shall continue until final disposition by the Supreme Court.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips, *Clerk*

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D. C. 20543

April 28, 1975

Robert L. McCarty, Esq.
McCarty & Noone
1225 Connecticut Avenue, N. W.
Suite 314
Washington, D. C. 20036

RE: COLORADO RIVER WATER CONSERVATION DIST. v. UNITED STATES, No. 74-940 and AKIN v. UNITED STATES, No. 74-949

Dear Mr. McCarty:

The Court today entered the following order in the above cases:

> "The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument. Mr. Justice Douglas took no part in the consideration or decision of these petitions."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable in No. 74-940.

Very truly yours,

MICHAEL RODAK, JR., *Clerk*
By /s/ HELEN K. LOUGHRAN
(Mrs.) Helen K. Loughran
Assistant Clerk

Supreme Court, U. S.
FILED
APR 14 1975
MICHAEL RODAK, JR., CLERK

Nos. 74-940 and 74-949

In the Supreme Court of the United States

OCTOBER TERM, 1974

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

MARY AKIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
WALLACE H. JOHNSON,
Assistant Attorney General,
WALTER KIECHEL, JR.,
Deputy Assistant Attorney General,
HARRY R. SACHSE,
Assistant to the Solicitor General,
EDMUND B. CLARK,
DONALD W. REDD,
LAWRENCE E. SHEARER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-940

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 74-949

MARY AKIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. No. 74-940, 1a-15a; Pet. App. A No. 74-949, 19-33)

is reported at 504 F. 2d 115. The oral opinion of the district court (Pet. App. No. 74-940, 17a-21a; Pet. App. B No. 74-949, 34-41) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1974. A timely petition for rehearing was denied on November 12, 1974. The petitions for writs of certiorari were filed on January 30, 1975, and February 1, 1975, respectively. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the McCarran Amendment, 66 Stat. 560, 43 U.S.C. 666, which consents to the joinder of the United States in general water adjudication actions, divests the federal district courts of jurisdiction in such actions when brought by the United States.

2. Whether the court of appeals was correct in ordering the district court to hear the case, rather than abstain in favor of an after-filed state proceeding.

STATUTE INVOLVED

43 U.S.C. 666, the McCarran Amendment, provides in pertinent part:

> (a) Joinder of United States as defendant; costs.
>
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

STATEMENT

On November 14, 1972, the United States instituted this civil action in the United States District Court for the District of Colorado to determine its water rights (for various federal reserves) and the water rights of the Ute Mountain Ute and Southern Ute Indian Tribes regarding the San Juan River and its tributaries in the State of Colorado.[1] Jurisdiction was invoked under 28 U.S.C. 1345, which provides

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[1] Pet. App. 3a, 30a. Unless noted to the contrary, "Pet." and "Pet. App." references are to the petition and appendix in No. 74-940.

that "the district courts shall have original jurisdiction of all civil actions, suits or proceedings, commenced by the United States * * *."

On January 3, 1973, apparently in response to this suit, several water districts of the State of Colorado filed suit in state court for adjudication of essentially the same water rights already at issue in the federal court suit (No. 74-940 Pet. 7, Pet. App. 3a; No. 74-949 Pet. 5).[2] The plaintiffs in the state court action and other water districts were allowed to intervene in the federal suit, after which they and various water users named in the federal suit moved to dismiss the proceedings in federal court.[3] In re-

[2] Petitioners, in No. 74-949, assert that "[a]n action was pending * * * to determine the relative rights of all parties to the San Juan River system (which is included in Water Division 7 under the state scheme) at the time the United States chose to ignore that appropriate forum and attempted to bifurcate the water right determination procedure by filing its action in the United States District Court" (Pet. No. 74-949, 11). This statement is contradicted by the same petitioners at Pet. 5, where they state "[o]n January 3, 1973, an action was commenced in state court (Water Division 7) which embraced the identical water right claims which the United States was advancing in federal court." It is also contradicted by the petition in No. 74-940. See pp. 6-7. Apparently, while there were periodical adjudications of particular claims to water in state court, no general stream adjudication had been undertaken as to the San Juan River System nor was the United States served notice of any action prior to January 3, 1973.

[3] The petitioners in No. 74-940 are those intervenors. The petition in No. 74-949 describes its petitioners as "approximately twelve hundred Colorado citizens, a number of public entities, and the State of Colorado" (Pet. 1). This description is somewhat confusing because none of the attorneys listed on the petition are shown as representing the individual water users and the State has not heretofore claimed to represent them as *parens patriae* nor does it so claim in the petition. There is also some overlapping. For instance, the Mancos Water Conservancy District seems to be a petitioner in both petitions.

sponse to the motion, the district court expressed doubt about its jurisdiction to hear the case, but without resolving the jurisdictional question, invoked doctrines of abstention and comity, and dismissed the United States' complaint (Pet. App. 17a-21a).

On the United States' appeal, the Court of Appeals for the Tenth Circuit reversed the district court's dismissal and remanded the case for further proceedings consistent with its opinion (Pet. App. 1a). The court of appeals held that the McCarran Amendment, 66 Stat. 560, 43 U.S.C. 666, does not divest the United States district courts of jurisdiction over water right adjudications to which the United States is a party, but merely permits the United States to be made a party to such adjudications whether brought in federal or state court. The court of appeals also held that in the circumstances of this case, where federal rights are at issue and there are no unresolved questions of state law, it was inappropriate for the federal court to decline to exercise its jurisdiction.

ARGUMENT

This case concerns nothing more or less than a choice of forum question. Will the extent and the

priority of the water rights of the Southern Ute and Ute Mountain Ute Indian Tribes, as well as other federally reserved rights, be litigated in state or federal court? The court of appeals properly held that the federal district court, where the action was filed, should not abstain in favor of a later-filed conflicting action filed in state court. The decision is correct and does not warrant further review.

1. Petitioners in No. 74-940 apparently assert here (Pet. 16-20), as they did in the court of appeals, that the McCarran Amendment and this Court's decisions in *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520, and *United States* v. *District Court in and for Water Division No. 5*, 401 U.S. 527, divest the United States district courts of jurisdiction to entertain water rights adjudications brought by the United States.[4] The court of appeals correctly rejected this contention (Pet. App. 4a-9a), holding that the McCarran Amendment is simply a waiver of sovereign immunity which permits the United States to be joined in general water adjudication proceedings but does not divest federal district courts of jurisdiction to entertain such actions and does not require the United States, as a plaintiff, to bring its actions in state courts.

The McCarran Amendment could hardly be read otherwise. The Amendment provides that "Consent

[4] Petitioners in No. 74-949 accept the jurisdiction of the district court and base their argument on discretionary abstention and comity. See No. 74-949 Pet. 2, Question Presented. See also note 5, *infra*.

is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source * * *" (43 U.S.C. 666a). There is nothing in the statute to indicate that the United States district courts are divested of the jurisdiction granted by 28 U.S.C. 1345 to adjudicate "civil actions * * * commenced by the United States."

The decision of the court of appeals in this regard is consistent with this Court's decision in *United States* v. *District Court in and for the County of Eagle, supra.* There the Court ruled on the extent of the consent to suit granted by the statute and quoted the following statement by Senator McCarran as an apt description of the Amendment (401 U.S. at 525):

> *S. 18 is not intended * * * to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream.* This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value. [Emphasis added.]

Similarly, nothing contained in this Court's opinion in *United States* v. *District Court in and for Water Division No. 5, supra*, even suggests that the McCarran Amendment barred federal courts from entertaining suits brought by the United States to

adjudicate water rights in rivers, streams and the like.[5]

2. The court of appeals also correctly held that the district court erred by invoking the abstention doctrine to avoid deciding the issues before it (see Pet. App. 9a-15a). One of the primary functions of the federal courts is to decide cases involving federal rights.[6] The government brought this suit because important federal and Indian water rights needed to be determined. Water rights adjudications are a normal part of the function of federal courts in the

[5] Accord: *United States* v. *Cappaert*, 508 F. 2d 313 (C.A. 9), pending on petition for a writ of certiorari, No. 74-1107.

Petitioners in No. 74-949 argue (Pet. 11-13) that comity required the federal court to defer to state adjudication.

Since the United States sued in the United States District Court before the action began in the Colorado state courts (see note 2, *supra*), comity would logically require the state courts to refrain from interfering with the United States District Court's adjudication of the water rights claimed by the United States in this action. *Covell* v. *Heyman*, 111 U.S. 176, 182-185; *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195-196; *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 230-231; *Palmer* v. *Texas*, 212 U.S. 118, 125; *Byers* v. *McAuley*, 149 U.S. 608, 614. The issues of federal-state relationship raised by the doctrine of comity are more fully discussed in part 2, *infra*, concerning abstention.

[6] As the court of appeals, quoting from Mr. Justice Story, stated (Pet. App. 5a): "It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts." Reserved rights to sufficient water to satisfy the needs of federal installations or Indian reservations are federal or federally protected rights. See *Arizona* v. *California*, 373 U.S. 546, 595-601.

western states.[7] A federal court is thus the proper forum in this kind of case where, as here, significant

[7] Federal courts, indeed, have remained a usual forum for western water rights adjudications where major federal rights are at issue. For example, the cases listed below are now pending in federal courts. We note, also, that a number of these cases were commenced by the State of New Mexico, one of the amici.

State of New Mexico v. *Aamodt, et al.*, Civil No. 6639 U.S. D.C., New Mexico (Water rights in Nambe-Pojoaque River).

State of New Mexico v. *Aragon, et al.*, Civil No. 7941 U.S. D.C., New Mexico (Water rights in Chama River).

State of New Mexico v. *Abbott, et al.*, Civil No. 7488 U.S. D.C., New Mexico (Water rights in Santa Cruz River).

State of New Mexico v. *Abeyta, et al.*, Civil No. 7896 U.S. D.C., New Mexico (Water rights in Pueblo de Taos River).

State of New Mexico v. *Arrellano, et al.*, Civil No. 7939 U.S. D.C., New Mexico (Water rights in Hondo River).

State of New Mevico v. *Acequia Del Alto de la Acequia Del Llano Community Ditch Assn., et al.*, Civil No. 8650 U.S.D.C., New Mexico (Water rights in Truchas River).

State of New Mexico v. *Molybdenum Corp.*, Civil No. 9780 U.S.D.C., New Mexico (Water rights in Red River).

United States v. *Bel Bay Community & Water Assn.*, Civil No. 303-71 U.S.D.C., W.D. Washington (Water rights on Lummi Indian Reservation).

United States v. *Walton*, Civil No. 3831 U.S.D.C., E.D. Washington (Water rights in unnamed tributary to Omac Lake on Colville Indian Reservation).

United States v. *Anderson, et al.*, Civil No. 3643 U.S.D.C., E.D. Washington (Water rights in Chamokane Cheek).

United States v. *J. Ed Smith*, Civil No. 71-17 Globe U.S. D.C., Arizona (suit to enjoin pumping from underflow of Gila River).

United States v. *Cappaert, supra* (Devils Hole National Monument).

federal and Indian reserved rights are involved, since the case will turn on issues of federal, not state, law. *United States* v. *District Court in and for the County of Eagle, supra*, 401 U.S. at 525-526. See also *Arizona* v. *California, supra*, 373 U.S. at 595-601; *Winters* v. *United States*, 207 U.S. 564. Indeed, the reserved rights doctrine is essentially alien to Colorado state water law. *United States* v. *District Court in and for the County of Eagle, supra*, 401 U.S. at 523.

Moreover, the district court was not presented with any issues of unclear state law, which might support the application of the doctrine of judicial abstention. See *Harman* v. *Forssenius*, 380 U.S. 528, 534; *Baggett* v. *Bullitt*, 377 U.S. 360, 375-377. In an adjudication of this sort the established priorities between state users are often a matter of record and easily established and the real question is the relation of federal rights to those state created rights (see p. 13, *infra*).

Particularly where Indian rights are at issue, a federal court is an appropriate forum. In 1966 Congress enacted 28 U.S.C. 1362 to provide district court jurisdiction for all civil actions brought by Indian tribes involving federal questions, without regard to

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[7] *United States* v. *Truckee Carson Irrigation District, et al.*, Civil No. R2987JBA U.S.D.C., Nevada (Water rights in Truckee River—Pyramid Lake).

United States v. *Tongue River Water Users Association, et al.*, Civil No. 75-20 U.S.D.C., Montana (Water rights in Tongue River and Rosebud Creek).

the amount in controversy. The House report recommending the bill stated that it is appropriate for litigation involving tribal lands held in trust to be brought in federal courts. (H. Rep. No. 2040, 89th Cong., 2d Sess. 2) The Senate report states (S. Rep. No. 1507, 89th Cong., 2d Sess. 2):

> There is great hesitancy on the part of tribes to use state courts. This reluctance is founded partially on traditional fear that tribes have had of the states in which their reservations are situated. Additionally, federal courts have more expertise in deciding questions involving treaties with the federal government, as well as interpreting the relevant body of federal law that has developed over the years * * *.

Similarly in 1953 in Public Law 280, 67 Stat. 588 (now codified at 18 U.S.C. 1162, 28 U.S.C. 1360 and, as amended in 1968, 25 U.S.C. 1321 and 1322), when Congress conferred civil jurisdiction on the courts of some states to adjudicate controversies arising in Indian country, it specifically withheld from state court jurisdiction the power to adjudicate "the ownership or right to possession of [real or personal property, *including water rights*, belonging to any Indian or Indian tribe]." 28 U.S.C. 1360(b) and 25 U.S.C. 1322(b) (emphasis added).

This Court has often recognized that federal courts are a desirable forum for litigating Indian rights. For instance, 25 U.S.C. 357 provides that Indian allotted land "may be condemned for any public purpose under the laws of the State * * * where lo-

cated in the same manner as land owned in fee may be condemned * * *." In *Minnesota* v. *United States*, 305 U.S. 382, the Court held that such suits could only be brought in federal courts, stating:

> There are persuasive reasons why that statute should not be construed as authorizing suit in a state court. It relates to Indian lands under trust allotments—a subject within the exclusive control of the federal government. The judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts. [305 U.S. at 389.]

Similarly, in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, the Court unanimously held that an Indian tribe's ejectment action, unlike similar actions brought by other claimants to land under federal law, was a federal question.

In sum, the district court erred when it abstained and the court of appeals correctly reversed the district court's judgment in this regard.[8]

3. Petitioners and *amici* seem to argue that the proper administration of justice requires that all stream adjudications be handled in state courts. But Congress has not endorsed that position and con-

[8] Petitioners in No. 74-940 argue (Pet. 16-20) that a state court has jurisdiction to determine Indian water rights although the McCarran Amendment refers only to federal water rights. This question need not be considered in this case under the decision of the court of appeals. Without Conceding that the McCarran Amendment consents to adjudication of Indian rights in state court, we here argue only that the federal court is clearly an appropriate forum for determination of such rights.

siderations of the convenience of the parties do not require it.

While the United States has served numerous defendants in this case, this provides both a notice and conclusiveness of result not available under the state procedures (compare No. 74-940 Pet. 12). Petitioners in No. 74-949 argue (Pet. 11-12) "If the federal action proceeds, over 1200 defendants must bear the oppressive burden of appearing in the geographically remote federal court to defend their water rights which were established pursuant to state law perhaps as long as a century ago." But it is not necessary that each served defendant individually prove his water right. Most of the non-federal and non-Indian water rights in this river system are subject to simple documentary proof.[9]

Moreover, to the extent that it is necessary to take testimony, this need not be done in Denver, where the district court sits (Compare No. 74-949 Pet. 11-12). An ordinary judicial technique in water adjudication is to appoint a special master to hold hearings where the defendants and the waters in question are located. See Rule 53, Fed. R. Civ. P. The decision of the court of appeals does not tie the hands of the district court in its management of this or future litigation.

[9] Indeed many are already established by the decree in *United States* v. *Morrison Consolidated Ditch Co., et al.*, Equity No. 7736, in the United States District Court for the District of Colorado, decided October 25, 1930.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

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APRIL 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 572994 140

Supreme Court, U. S.
FILED
APR 23 1975
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1974

No. 74-940

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

No. 74-949

MARY AKIN, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONER'S REPLY MEMORANDUM TO THE BRIEF IN OPPOSITION

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The court below depended heavily on an isolated portion of the legislative history of the McCarran Amendment as refuting any Congressional intention to exclude federal court jurisdiction under 28 U.S.C. 1345 over water rights administration and adjudication matters (Pet. App. 8a). The government likewise, in support of the circuit's opinion, relies heavily upon this

same extract from the debates (Brief in Opp. 7) as follows:

> S. 18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

We respectfully submit that both the court below and the government misconstrue this piece of legislative history. In reaching for the point they overlook completely the clear import of this extract which embodies the full thrust of the McCarran Amendment, namely that all parties having claims, and all of their claims, should be joined in properly instituted state proceedings, for otherwise ". . . any subsequent decree would be of little value."

This Court has already put this in proper context in its decision in *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520 where it used the very same quote in rejecting the government's argument that a general adjudication was not involved. To the contrary, this Court said, the United States must submit all of its claims in those proceedings because "The whole community of claims is involved . . ." (401 U.S. at 525).

As the government notes, the district court did not resolve this jurisdictional question (Brief in Opp. 5), nor, we submit, need this Court resolve it here. The fact remains that the United States has been served in the proceedings in Water Division 7, and pursuant to the McCarran Amendment and this Court's decisions,

should submit its claims in that water court, as an essential part of the whole community. It was this practical reality, to the end that there would not be two separate proceedings and two separate decrees involving the same water, that very appropriately brought the decision to abstain.[1]

The suspicion that the government itself voiced in the *Eagle County* and *Water Division 5* litigation concerning fair treatment in state proceedings which this Court rejected out of hand lingers on in the government's discussion of their claims to water for use on Indian lands. There is nothing in either of the decisions below holding that such claims must be adjudicated in the federal courts. What is more clear than ever from the government's argument is that there would be duplicate proceedings with the government, indeed, contending that it would be a simple matter for a special master to sit in the same region where a water court is already sitting and presiding over the same water and in many instances over the same claims.

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[1] The citation to the seven New Mexico cases (Brief in Opp. p. 9) is not persuasive since all save *Molybdenum Corp.* (a special situation) were filed before this Court's decision in *Eagle County*, which clarified the reach of McCarran. We are advised that since *Eagle County*, New Mexico has filed two proceedings in their state courts both involving claims to waters for Indian lands, one of which involves water rights in New Mexico claimed on behalf of one of the Ute Indian Tribes here involved. Removal of one of these cases is being contested through remand proceedings. In addition, the Pueblo Indian Tribes in New Mexico own their properties in their own right and claim their water rights as aboriginal, a situation possibly making 28 U.S.C. 1360(b) applicable thereto, as opposed to reserved rights held in trust, for the Ute Indians in Colorado, and New Mexico through reservation by the United States. With regard to the State of Washington cases, we are advised that these are exceptions there rather than the rule; that since 1964 the United States has adjudicated reserved rights in state courts in that State.

This would not only result in mal-administration of this precious resource but would make a shambles out of the Congressional intent in enacting the McCarran Amendment.[2]

The decision of the district court to abstain was clearly correct and the decision below to remand the case should be reversed, without more.

Respectfully submitted,

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[2] The United States has not served any named defendants in this action. The only present parties, other than the United States, are the intervenors. The federal decree the United States requests on the San Juan River would supplant prior state decrees, and would force disputes on the administration of that River into federal court, despite McCarran, further imposing a needless burden on the federal court system.

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(Continued on Page 2 Cover)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-940

THE COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

No. 74-949

MARY AKIN, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit *sub nom. United States of America* v. *Mary Akin, et. al.,* is reported at 504 F.2d 115 (1974). This opinion reversed the opinion and order of the United

States District Court for the District of Colorado which was issued orally and is unreported. Both opinions are reproduced as appendices in the petitions for writs of certiorari (see Pet. App. No. 74-940, 1a, 17a; Pet. No. 74-949, App. A, p. 19, App. B, p. 34)[1] and accordingly are not reprinted in the Single Appendix (A.).

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1974. A timely petition for rehearing and suggestion for rehearing *en banc* by petitioners (A. 16) was denied on November 12, 1974 (A. 27). The petitions for writs of certiorari were filed in this court on January 30, 1975 (No. 74-940) and February 1, 1975 (No. 74-949). Certiorari was granted in both petitions and the cases consolidated on April 28, 1975 (421 U.S. —; A. 30). The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Did the court of appeals err in reversing the exercise of discretion by a federal district court to decline on the grounds of abstention and comity to exert jurisdiction over a suit by the United States for the adjudication of Federal claims to a portion of the same waters involved in a pending state water court adjudication in which the United States had been joined pursuant to the McCarran Amendment (43 U.S.C. 666)?

2. Did Congress intend in the McCarran Amendment that general water rights adjudications, such as are involved here, be conducted in state proceedings?

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[1] Unless noted to the contrary Pet. App. references herein are to the appendix in the petition in No. 74-940.

STATUTES INVOLVED

The immediate federal statutory provision involved is 43 U.S.C. 666, 66 Stat. 560, commonly referred to as the McCarran Amendment, which provides:

§ 666. *Suits for the adjudication of water rights—Joinder of the United States as defendant; costs*

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

Service of Summons

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

Joinder in suits involving use of interstate streams by State

(c) Nothing in this section shall be construed as authorizing the joinder of the United States in

> any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. July 10, 1952, c. 651, Title II, § 208(a)-(c), 66 Stat. 560.

Also involved is the Water Rights Determination and Administration Act of 1969, article 92 of title 37, C.R.S. 1973, as amended (commonly and hereinafter referred to as the 1969 Act), which provides a complete system for the adjudication and administration of the waters of the natural streams in the State of Colorado. Pertinent provisions of the 1969 Act are contained in the Petition in No. 74-949, Appendix C, pp. 42-63.

Both the McCarran Amendment and the 1969 Act as well as the Colorado adjudication act in effect prior to 1969 were construed by this Court in 1971 in *Eagle County* and *Water Division 5*.[2]

STATEMENT OF THE CASE

In accordance with this Court's March 1971 opinions in *Eagle County* and *Water Division 5*, the United States thereafter set forth all of its claims to the use of water, including claims to appropriative and reserved rights, in three of Colorado's seven water divisions (Divisions 4, 5 and 6), where adjudications were ongoing and in which the Government had been served under the McCarran Amendment. Although similar

[2] *U. S.* v. *District Court in and for the County of Eagle, State of Colorado, et al.*, 401 U.S. 520 (1971); *U. S.* v. *District Court in and for Water Division No. 5, State of Colorado, and the Judge thereof, the Honorable Clifford H. Darrow, and the Water Referee thereof*, 401 U.S. 527 (1971), herein *Eagle County* and *Water Division 5*, respectively.

proceedings had likewise been underway since October 1970 in Water Division 7, the United States nevertheless instituted its own suit[3] on November 14, 1972, in the United States District Court in Denver, some 300 miles distant from the Water Court in Water Division 7, involving waters within the jurisdiction of the latter court. This suit, against some 1000 named water users and unnamed others, seeks to have declared and determined all of the federal claims to the use of the waters of the "Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo and San Juan Rivers and waters tributary thereto in the State of Colorado,"[4] which constitute only a part of the waters of Water Division No. 7. These rivers are within the San Juan Basin and are tributary to the Colorado River System.[5]

On December 22, 1972, the Government was served under the McCarran Amendment in the Water Division

[3] A copy of the complaint is reprinted at Pet. App. 21a. Jurisdiction was asserted under 28 U.S.C. 1345, which provides in pertinent part:

> *Except* as otherwise provided by Act of Congress the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States . . . (emphasis supplied).

[4] See Complaint, Pet. App. 30a and Map of Water Division 7 at Pet. App. 41a.

[5] The upper Colorado River and its principal tributaries (except for the Green River) originate within Colorado. The annual average outflow from the State amounts to approximately 80% of the river's flow at Lee Ferry, the gauging station between the Upper and Lower Basins under the Colorado River Compact of 1922 (see *Arizona* v. *California*, 373 U.S. 546 (1963)). Though the San Juan River Basin is by no means the largest contributing source, its proper administration with relation to other Colorado contributor tributaries is critical in the administration of water uses on all of the streams in Colorado naturally draining to Lee Ferry.

7 proceedings [6] but filed therein only its claims relating to waters in the Dolores River drainage within that Division, omitting the claims which the Government had asserted in the federal court in Denver. The claims in the latter court, as well as those set forth in Water Division 7, included claims for reserved rights as well as appropriative rights under state law. Among the reserved rights claimed by the Government in Denver, are those for use in connection with Mesa Verde National Park, the Yucca House and Hovenweep National Monuments, and the San Juan National Forest.[7] Claims to appropriative rights under State law include those for Bureau of Reclamation projects and for lands administered by the Bureau of Land Management in the area. Also for itself on behalf of the Indian tribes, the United States claimed reserved rights for use in connection with the Ute Mountain Ute and Southern Ute Indian Reservations. The extent and location of all of these claims, however, are totally undefined in the complaint and thus their potential impact on other water users of the area is unclear.

As above noted, the Government is presently participating fully in Water Divisions 4, 5 and 6, as well as in

[6] Both petitions for certiorari and the Government's brief in opposition did not mention this service. The January 3, 1973 date referred to therein was the date of service pursuant to Fed. R. Civ. P. 4(d)(4) which was accomplished upon the U.S. Attorney in Denver, and again upon the Attorney General in Washington, D.C. Service included copies of the resumes of claims filed in Water Division 7 during November 1972. See A. 2-5.

[7] Included as a part of the U.S. claims in the state water court proceeding in Water Division 7 are those made in connection with that part of the San Juan National Forest in the Dolores River drainage. Thus the Governmeint proposes to split the adjudication of claims in connection with that Forest between the water court in Water Division 7 and the federal court in Denver.

former Water Districts 36, 37, 51 and 52, pursuant to this Court's unanimous opinions in *Eagle County* and *Water Division 5* holding that § 666 subjected *all* federal claims, including those to reserved rights, to state proceedings. The Government's claims to water rights in those pending state proceedings are identical in nature to the claims now being made by the Government in the federal district court in Denver, save only that the claims in that court include claims for the two Indian reservations.

Upon reviewing all of these circumstances the federal district court in Denver granted a motion to dismiss, finding that Colorado had a well defined, workable system for water adjudication; that the Government under the McCarran Amendment was not immune from suit; that the Government was pursuing all of its claims in Water Divisions 4, 5 and 6 and had been served in 7; and that while § 666, *Eagle County* and *Water Division 5* might not require exclusive jurisdiction in state courts (Pet. App. 19a):

> . . . they nonetheless point out to our satisfaction that deferral of jurisdiction to state courts is justified when, as a practical matter, retention of federal jurisdiction on some claims would result in a piecemeal solution of a larger problem.

The district court was further concerned with the dual system of decrees which would result and the possibility of conflicts eventually requiring additional litigation; the unreasonable burden on the some 1000 citizens who have proximity to the state court but not to the federal court in Denver; saw the state court as having the same obligation to enforce federal law as well as having a considerable expertise in questions

of water law which had been a hundred years in development; and concluded that federal jurisdiction should be withheld on the principles of abstention and of comity (Pet. App. 20a-21a):

> . . . [as the state forum] can fully and adequately adjudicate the issues, . . . be they the national forests, the Indian tribes, or any other individual litigants. To this end the court is granting the defendants' Motion to Dismiss.

The Government appealed to the Tenth Circuit. That court characterized the primary issue as whether ". . . the District Court was correct in its abstention stance" (Pet. App. 4a, 9a), and reversed, saying *inter alia* that various factors to be weighed in the "abstention scale" (Pet. App. 12a) did not favor the application of the doctrine and that this Court had not held or even suggested in *Eagle County* and *Water Division 5* that abstention be ordered.[8]

Petitions for writs of certiorari were filed with this Court on January 30, 1975 (No. 74-940) and February 1, 1975 (No. 74-949). Certiorari was granted and the cases consolidated on April 28, 1975 (A. 30). Petitioners are presenting their arguments jointly in this single brief.

SUMMARY OF ARGUMENT

I.

The district court, recognizing the impracticality of trying the suit brought by the United States, invoked the doctrines of abstention and comity to remit the Government to the ongoing state proceeding for the determination of its claims to the use of water, along

[8] Abstention was never an issue in those cases.

with the adjudication of the rights of all other claimants. It would be difficult to find a more fitting situation for the application of abstention and comity in the sound discretion of the district judge. The special circumstances required to permit invocation of these doctrines are here in abundance. The avoidance of duplicative proceedings in two courts presiding simultaneously over one resource; the importance of water to Colorado and the maintenance of its unified water right determination and administration system; the nature of federalism; and the wise utilization of judicial resources, all compel use of the abstention and comity doctrines. The court of appeals, without any discussion of comity and without finding any abuse of discretion in the application of abstention simply substituted its own view that the Government should be permitted to pursue its claims in the district court. In the face of all of the circumstances which are present we think this was indiscretion.

II.

This case, as did both *Eagle County* and *Water Division 5*, concerns itself solely with the question of what forum should hear and determine the whole community of claims to water. Questions of the doctrine of implied reservation of waters and their extent and purpose are not involved. This Court, upon reviewing the exhaustive treatment of the legislative history of § 666 presented to it in *Eagle County* and *Water Division 5*, rejected the Government's position that *all* claims to the use of water were not to be included in the state proceedings, and found that § 666 made no exceptions. Indeed, in the latter case this Court considered the state adjudicatory procedures in Colorado

under its 1969 Act as continuous and ongoing, and open to the consideration of all claims, including those of the United States from whatever source derived. To now separate out the claims here involved for adjudication in federal court would effectively veto § 666 and negate the salutary results of *Eagle County* and *Water Division 5*.

ARGUMENT

I. THE DISTRICT COURT PROPERLY APPLIED THE DOCTRINES OF ABSTENTION AND COMITY IN DISMISSING THE COMPLAINT.

A. The Special Circumstances Which Call for the Application of Abstention Are Here in Abundance.

The doctrine of abstention, by which a federal court declines jurisdiction in order that a state forum may first resolve a controversy, could find no better set of circumstances for application than exist here. The district court correctly ascertained the multitude of special circumstances which not only make abstention appropriate but would make the assumption of jurisdiction unwise. This Court has regularly sustained the discretionary exercise of abstention in clearly analogous situations.

The abstention doctrine was first expressly articulated in *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941) and the general rationale announced by the Court there is highly applicable here (at 500-501):

> . . . Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies . . . . These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion," restrain their authority because of "scrupulous regard for the rightful independence of state governments" and for the smooth working of the federal judiciary.
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> * * *
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> . . . In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands.

Burford v. *Sun Oil Co.*, 319 U.S. 315 (1943) broadened the doctrine and is particularly analogous to the circumstances of this case. There, the district court's dismissal of the complaint was upheld on the ground that the issues involved a specialized aspect of a complicated regulatory system which should be left to the expertise of state administrators and courts. The opinion noted the importance of the natural resources involved to the state, the complexity of the legal issues, the capabilities of the Texas adjudicatory system, the value in a unified method of determining cases, a sound respect for the independence of state action, and the avoidance of federal-state conflict. All of these matters are present here, and were integral factors in the district court's decision.

The Colorado courts should be allowed the primary opportunity to resolve the questions pertaining to the integration of any federal rights within the state appropriative system. The integration of federal claims to the use of water into the Colorado system is simply ". . . one more item in a continuous series of adjustments" which the state system should be left free to handle. *Burford, supra* at 332, citing *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U.S.

573, 584 (1940). Unless the Colorado courts are given this opportunity, this Court's findings in 1971 in *Eagle County* and *Water Division 5* of jurisdiction in Colorado's courts to determine the federal water claims will be circumvented.

Those 1971 opinions in our view leave no doubt as to the interrelated nature of rights to the use of water. The adjudication and administration of a water right relates to all rights claimed in a common source of supply. The crucial concern in such proceedings is the relative priorities of the users. In Colorado, this interdependency has led to the adjudication and administration of water rights on a continuing basis in special water courts which also determine changes in use, alteration and transfer of diversion points, waste and nonbeneficial uses and abandonment. This interrelationship was of course recognized in the McCarran Amendment which not only permits the joinder of the United States for the adjudication of water rights but also for their administration. This legislation was a practical solution to a potentially chaotic situation.

The avoidance of friction between the federal judiciary and state regulatory entities has often been declared to be a proper basis for the application of abstention as it was recently, for example, in *Allegheny Airlines* v. *Pennsylvania Public Utilities Commission,* 465 F.2d 237, 243 (3d Cir. 1972), *cert. denied,* 410 U.S. 943 (1973):

> . . . [T]he primary concern running through the cases in which the Court has abstained for equitable purposes seems to be the possibility of friction caused by the interference with the orderly procedures and rules of state *regulatory bodies.* (Emphasis in original.)

See also Gay v. *Board of Registration Commissioners,* 466 F.2d 879 (6th Cir. 1972).

The court below did recognize that under the rationale of *Burford* federal courts should abstain where the assumption of jurisdiction would unduly interfere with a state regulatory scheme. However, without explanation, the court concluded that (Pet. App. 11a):

> Here the federal court is not shortcircuiting or interfering with the efforts of a state administrative regulatory system, whereby the *Burford* rule could operate.

In truth, the interference would be significant and of great injury to the present Colorado regulatory scheme. After a century of experience and refinement, Colorado's water right system skillfully and comprehensively adjudicates and administrates rights to the use of this scarce resource. As the district court declared (Pet. App. 20a):

> . . . the forums that are established through the state are recognized as a workable network of administration with considerable expertise under a body of law that has been a hundred years in development and perhaps the system of priorities and propositions runs parallel to the history of the state and in fact is engrained in the Colorado Constitution. The court can see no practical argument in having or persuasive argument in having another forum exercise jurisdiction.[9]

The complaint of the United States seeks an independent adjudication of federal water claims and the

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[9] See also *Railroad Commission of Texas* v. *Rowan & Nichols,* 311 U.S. 570, 575 (1941) where this Court noted that a local regulatory agency ". . . equipped to deal with everchanging aspects possesses an insight and aptitude which can hardly be matched by judges who are called upon to intervene at fitful intervals."

appointment of a federal water master to determine water rights in a water source presently administered by state officers and state water courts. The relief sought portends chaos: both state and federal courts as well as water administrators will be confronted with the same questions concerning water uses; the day to day adjustments necessary in the administration of waters will be confused and perhaps impossible; the myriad of post-decree problems such as changes in use, plans of augmentation, and abandonments will become complicated and oppressive to the parties involved. The potential quagmire of dual adjudication and administration clearly calls for the application of *Burford, supra,* and thus the dismissal of the federal suit. When a federal right is so enmeshed in a state scheme of regulation, considerations of common sense as well as federalism point to abstention as the practical solution.

Indeed, the practicalities of the situation were repeatedly adverted to by the district court in its invocation of abstention. For example (Pet. App. 19a-20a):

> . . . deferral of jurisdiction to state courts is justified when, *as a practical matter,* retention of federal jurisdiction would result in a piecemeal solution of a larger problem.
>
> The court perceives *a practical approach* in this case. Aside from the strict legal interpretations, the court envisions that *a practical approach* must be recognized that we would be creating a dual system of administration and decrees of water rights and potentially could require water users needlessly to readjudicate rights already decreed under state law. These water users have proximity to state courts and from a distance factor alone, there are *practical* impediments to requiring everyone in this particular area to litigate the matter in the federal courts. (Emphasis supplied.)

These and other practical concerns noted by the district court and the appropriateness of avoiding federal-state conflict have frequently been voiced by this Court, as in *Public Service Commission of Utah* v. *Wycoff,* 344 U.S. 237, 247-48 (1952):

> . . . State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. . . .
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> * * *
>
> . . . State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.

Despite its statement to the contrary, the circuit court has "shortcircuited" the regulatory system of Colorado by ordering the continuance of a suit which will clearly circumvent the state's adjudicatory and administrative framework.

In addition, Colorado's historic concern with water should certainly bear some weight in the abstention scale. Water is intimately tied to the history as well as the future of the state. Where a natural resource is of such significance, this Court has found the requisite special circumstances, *Kaiser Steel Corp.* v. *W. S. Ranch Co.,* 391 U.S. 593, 594 (1968):

> The Court of Appeals erred in refusing to stay its hand. The state law issue which is crucial in this case is one of vital concern in the arid State

> of New Mexico, where water is one of the most valuable natural resources . . . . Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource.

The result was similar in *Reetz* v. *Bozanich,* 397 U.S. 82, 87 (1970), where fish resources were declared to be of great concern to Alaska; in *Burford, supra,* where oil and gas were recognized as of paramount importance to Texas; and should be the same here.

Furthermore, abstention is supported by concern for sound judicial administration. Parallel proceedings and dual jurisdiction over a single source of water would be an anomaly in a era of serious concern about overburdened court dockets. "Abstention is variously recognized . . . (4) to ease the congestion of the federal court docket." Wright, Law of Federal Courts 196, § 52 (2d Ed, 1970). Water right adjudications can be lengthy and complex. Protracted litigation in a court geographically remote from the subject matter and from the vast majority of defendants will obviously encumber the local federal court resources and burden a substantial citizenry left to wonder about such a clear duplication of the pending state proceeding which, being truly comprehensive while the federal suit is not, must go forward in any event.

The abundance of special circumstances calling for abstention here make the district court's discretionary determination unassailable. The avoidance of federal-state friction, the complexity of the subject matter, the existence of an expert state regulatory scheme, the cardinal significance of water to Colorado, the pres-

ence of a parallel state case, the potential adverse practical consequences of dual proceedings and the needless use of federal judicial resources all decidedly press for the invocation of abstention.

B. Comity Was Also a Proper Basis for Declining Jurisdiction and Should Have Been Considered by the Court Below.

The court below, while recognizing that the federal district court partially based its decision on the grounds of comity, failed to discuss comity at all.

This Court articulated the notion of comity in *Younger* v. *Harris,* 401 U.S. 37, at 44 (1971) as:

> . . . a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

This Court went on to note that the principle of federalism, which lies at the heart of this controversy, established (*id*):

> . . . a system in which there is sensitivity to the legitimate interests of both State and National Government, and in which the National Government, anxious though it may be to vindicate and protect federal rights and interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Comity may be realized through the exercise of abstention in situations where declining to take jurisdiction will promote our federal system. The policy of comity is particularly vital in preserving concord-

ance between federal and state forums and avoiding potential conflicts between the respective spheres. As this Court stated in *Great Lakes Dredge & Dock* v. *Huffman,* 319 U.S. 293, 298 (1943):

> . . . courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.

The district court, in arriving at its decision to grant the defendant's motion to dismiss, correctly applied the doctrine of comity by recognizing the historic practice of state water adjudications and the ongoing nature of such proceedings. As we have noted, however, the circuit, even while recognizing that the district court's action included "reasons of comity" (Pet. App. 4a) did not address itself to this vital principle at all. Had it done so we submit that it would have perceived that the principle was developed for application to situations exactly like this one where sensitivity to state policies is desirable and cooperative judicial federalism may be advanced.

The recent decision of this Court in *Huffman* v. *Pursue Ltd.,* 420 U.S. 592 (1975), reiterated the commanding role of comity in maintaining federal-state judicial balance and harmony (at 602):

> The seriousness of federal judicial interference with state civil functions has long been recognized by this Court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence.

This statement in *Huffman* makes it abundantly clear that comity is proper where "Federal adjudication of

the matters at issue in the state proceeding may otherwise be an unwarranted and unseemly duplication of the state's own adjudicative process." *Lynch* v. *Snepp,* 472 F.2d 769, 774 (4th Cir., 1973). This Court cited *Lynch* in its recent decision in *Huffman* noting (at 607):

> Informed by relevant principles of comity and federalism, three courts of appeals have applied *Younger* when pending state proceedings were civil in nature. [Also citing *Duke* v. *Texas,* 477 F.2d 244 (C.A.5, 1973) and *Cousins* v. *Wigoda,* 463 F.2d 603 (C.A.7, 1972).]

This approach is fully warranted in our case, where here, as in *Lynch,* the district court emphasized the futility of dual litigation, a concern over the crowded dockets of the federal courts and the spirit of federal-state comity.

Indeed, in *General Investment and Service Corp.* v. *Wichita Water Co.,* 236 F.2d 464 (1956) the Tenth Circuit itself recognized the efficacy of comity in terms of real applicability here, as follows (at 468):

> . . . The principle is well established and without dispute that under the rule of comity under our dual system of Government in cases involving state laws, rules or regulations, equitable considerations will under certain circumstances require federal courts to stay their hands where the parties have an adequate, speedy and complete determination of the controversy in a state tribunal. No cases need be cited to support this statement. . . .

Had the circuit reviewed the action of the district court here utilizing those announced guidelines, the district court should certainly have been sustained.

Despite the Government's assertion to the contrary, the fact that it filed in the U.S. District Court before

being served in Water Division 7 does not diminish the force of comity. This Court ruled, in *Pennsylvania* v. *Williams*, 294 U.S. 176, 184 (1934), that even where the state court has not previously asserted its jurisdiction, it is proper for a district court to abstain to state administrative process, which is "charged by the statutes of the state with the duty of supervising . . ." the matter in question.[10] The court below, however, found that the Government, as the first filer, had the right to have the case tried in federal court despite the pendency of the state proceeding. This Court recently rejected this view in *Hicks* v. *Miranda,* 422 U.S. —— (43 U.S.L.W. 4857, 4862) stating:

> . . . Neither *Steffel* v. *Thompson,* 415 US. 542, nor any other case in this Court had held that for *Younger* v. *Harris* to apply the state criminal proceedings must be pending on the day the federal case is filed.

While we recognize that *Huffman* concerned an attempt to have the federal courts decide a question of the constitutionality of a state nuisance statute, and *Hicks* involved constitutional questions in a criminal action, we think the general principles guiding the application of the comity doctrine enunciated in these cases have equal force here. Although this Court did not use the terms of abstention and comity in the early case of *Pacific Live Stock Co.* v. *Oregon Water*

[10] Citing that decision, it has been held that:

> ". . . federal jurisdiction must be relinquished to the state court, *even where jurisdiction attaches later in point of time than does the federal,* in cases such as this, where the matter is peculiarly within the province and duty of the state, its officers or courts." *Hutchins* v. *Pacific Mut. Life Ins. Co. of California,* 20 F. Supp. 150, 152 (S.D. Cal., 1937) (Emphasis supplied).

Board, 241 U.S. 440 (1916), that case involved much the same situation as presented below and there this Court found that even where two suits to determine water rights had been first initiated in a federal district court, the judge properly remanded the action to the state body, citing to the efficacy of state proceedings as avoiding "long and vexatious controversies."[11] The same result should obtain here.

Thus, whatever value may attach to the making of a filing some several weeks in advance in one forum as opposed to another, it should not be held to subvert the overriding concerns which are present here and which clearly sustain the application of comity by the district court.

C. Invocation of the Principles of Abstention and Comity Are Within the Sound Discretion of the Trial Judge and Absent a Show of Serious Abuse, May Not Be Overturned.

Although no longer limited to equity cases, the doctrine of abstention is based upon equitable considerations. It ". . . involves a discretionary exercise of the court's equity powers." *Baggett* v. *Bullitt,* 377 U.S. 360, 375 (1964). In *Burford, supra* (at 317-18) this Court emphasized the discretion of the lower court in the context of abstention:

> . . . a federal equity court . . . may, in its *sound discretion,* . . . "refuse to enforce or protect legal rights, the exercise of which may be prejudicial

[11] *Pacific Live Stock Co.* v. *John H. Lewis, James T. Chinnock and George T. Cochran, Constituting the State Water Board of the State of Oregon, et al,* 241 U.S. 440, 449 (1916) was utilized by the Senate Judiciary Committee in its consideration of proposed legislation which led to the enactment of the McCarran Amendment (43 U.S.C. 666) and is discussed in that context in Part II A of this brief, *infra,* pp. 25-28.

> to the public interest"[4], for it "is in the public interest that federal courts of equity should exercise *their discretionary power* with proper regard for the rightful independence of state governments in carrying out their domestic policy"[5]. (Emphasis supplied.)

[4] *United States ex rel. Greathouse* v. *Dern,* 289 U.S. 352, 360 (1933).

[5] *Pennsylvania* v. *Williams,* 294 U.S. 176, 185 (1934). . . .

See also, *Meredith* v. *Winter Haven,* 320 U.S. 228 (1943).

The Government has argued that where federal courts have jurisdiction, it is their duty to exercise it. "But, it by no means follows from the fact of district court jurisdiction that such jurisdiction must be exercised . . ." *Alabama Public Service Com.* v. *Southern R. Co.,* 341 U.S. 341, 345 (1951). The Court has stated: ". . . courts of equity should exercise their *discretionary* power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states." *Great Lakes Dredge & Dock Co.* v. *Huffman, supra,* at 298 (emphasis supplied); *see also Railroad Com. of Texas* v. *Pullman, supra.*

As this Court observed in *Lemon* v. *Kurtzman,* 411 U.S. 192, 200 (1973):

> In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow . . . . Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary,[2] what is fair, and what is workable.[12]

These fundamental principles relating to appellate review as well as to the function of the lower court to produce a fair and workable result would indicate that the trial court can best determine the applicability of the principles of abstention and comity to a given case. At the very threshold of the proceeding the factors of federalism, the extent of interference with state processes, the importance of the subject matter to the state, the capabilities of the state proceeding, the effects of denying a federal forum, and the burden on the judicial resources of the court can all be weighed. The deference to be given the trial court's decision on abstention was underscored by the Court in *Louisiana Power & Light Co.* v. *Thibodaux,* 360 U.S. 25, 29-30 (1959):

> . . . Procedures for effective judicial administration presuppose a federal judiciary composed of judges well-equipped and of sturdy character in whom may be safely vested, as is already, a wide range of judicial discretion, subject to appropriate review on appeal.
>
> * * *
>
> . . . In providing on his own motion for a stay in this case, an experienced district judge was responding in a sensible way to a quandary . . .
>
> * * *
>
> . . . the district judge determined to solve his conscientious perplexity by directing utilization of the legal resources of Louisiana . . .

The exercise of discretion by the trial judge in the present case should have been given like deference.

The court of appeals made no finding of an abuse of discretion. Rather, it simply substituted its own discretion for that of the district court. In particular, its failure to discuss comity at all reflects its action of not reviewing but simply rejecting the district court's dis-

[12] Citation and footnote omitted.

cretion in favor of its own. The result was an overly narrow, overly technical viewpoint which does not come to grips with the circumstances which led to the fair and practical result in the district court. The result in the latter court should be given effect by reversal of the opinion below.

II. CONGRESS INTENDED THROUGH THE McCARRAN AMENDMENT THAT GENERAL WATER RIGHTS ADJUDICATIONS, AS HERE, BE CONDUCTED BY STATE TRIBUNALS, WHICH HAVE JURISDICTION OVER ALL CLAIMS OF THE UNITED STATES AS DECLARED IN EAGLE COUNTY AND WATER DIVISION 5.

A. The Intent of McCarran as Declared in Eagle County and Water Division 5.

The legislative history of the McCarran Amendment, so fully set out for this Court's consideration in the briefs presented in the *Eagle County* and *Water Division 5* litigation, leaves no room for doubt that passage of that legislation resulted from, and was intended to correct, the confusion, conflicts and inequities arising from the refusal of the United States to submit jurisdictionally to state proceedings in water matters. After some three years of consideration, the Congress elected to waive sovereign immunity to suit against the United States in such cases. The waiver of immunity was clear and unambiguous, extending to *all* of the Government's claims to the use of water as this Court found in *Eagle County* in disposing of the argument that reserved rights were not intended to be included (401 U.S. at 524):

> . . . for we deal with an all-inclusive statute concerning "the adjudication of rights to the use of water of a river system" which in § 666(a)(1) has no exceptions and which, as we read it, includes

> appropriative rights, riparian rights, and reserved rights.[13]

The Court then went on to distinguish such adjudications from those in cases like *Dugan* v. *Rank*, 372 U.S. 609 (1963) stating that in an adjudication proceeding such as the one involved in *Eagle County* (at 525):

> . . . The whole community of claims is involved and as Senator McCarran, Chairman of the Committee reporting on the bill, said in reply to Senator Magnuson:[4] "S.18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value."
>
> * * *

[4] S. Rep. No. 755, 82 Cong., 1st Sess., 9. And see *Pacific Live Stock Co.* v. *Oregon Water Bd.*, 241 U.S. 440, 448.

[13] The legislative history shows that the Justice and Interior Departments opposed the legislation claiming that the general waiver of immunity ". . . would result in the piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions and the joinder of the United States in many actions in all of which it would be required to claim every right which it could conceivably have or need . . ." See Hearings on S. 18 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess. (1951) at 66-67. The representative of the Attorney General made it clear at the hearings on S.18 that the proposed legislation would embrace *all* manner of claims to water rights on behalf of the United States, including claims for reclamation, Indian, Defense, forest and soil conservation purposes. See e.g. Hearings, *supra* at 6, 7.

Similarly, in *Water Division 5,* where water proceedings under Colorado's new 1969 Act were in issue, this Court said (at 529-530):

> . . . The present suit, like the one in the *Eagle County* case, reaches all claims, perhaps month by month but inclusively in the totality; and, as we said in the other case, if there is a collision between prior adjudicated rights and reserved rights of the United States, the federal question can be preserved in the state decision and brought here for review.

This Court thus recognized the 1969 Act as establishing a continuing process whereby claims of all parties may be determined in relation to others using water from the same source. Those proceedings are continuously open to all those having claims to the use of water within the State, including of course the United States.

The above-noted citation by this Court in *Eagle County* to *Pacific Live Stock* v. *Oregon Water Bd.,* 241 U.S. 440 (1916) is of particular significance in the circumstances of the case presented here. In *Pacific Live Stock* this Court discussed fully what Mr. Justice Douglas characterized in *Eagle County* as the "whole community of claims".[14] But further, in the process

[14] See *Pacific Live Stock,* 241 U.S. at 447-48:

> . . . Unlike [merely private suits brought to restrain alleged encroachments upon the plaintiff's water rights], the proceeding in question is a quasi public proceeding set in motion by a public agency of the state. All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceedings. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first that the waters may be distributed, under public supervision among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights

the Court upheld a federal district court remand to the state water board of proceedings which the plaintiff had sought to remove to the federal district court, in which he had instituted suit before the state proceedings had commenced. This Court said that the rule that the court where the suit is first brought should retain jurisdiction did not apply to defeat a general water adjudication in favor of the more restrictive suit brought by the plaintiff in the federal court to determine water rights.[15]

In the light of *Pacific Live Stock* there is a strong case for upholding the exercise of discretion by the district court to abstain in this case, quite apart from the subsequent McCarran Amendment and this Court's application of that statute in *Eagle County* and *Water Division 5.* With the addition of McCarran, and the teaching of *Eagle County* and *Water Division 5,* the case becomes overwhelming. In considering § 666 the Senate Judiciary Committee quoted from this Court in *Pacific Live Stock* to describe state water adjudicatory proceedings.[16] Now, not only the subject mat-

> of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

[15] *Pacific Live Stock* at 447. To the same effect on removal and remand see *In re Green River Drainage Area,* 147 F.Supp. 127 (D. Utah 1956) and *Four Counties Water Users Assn.* v. *Colorado River Water Conservation District and the United States of America,* Civ. No. 8880, District Court of Colorado, Chilson, J. 4/12/65 unreported but contained in the record below in these proceedings at R.259.

[16] S. Rep. No. 755, 82d Cong., 1st Sess., 5. The quoted portion, taken from 241 U.S. 447-448, is included in the quote shown in fn. 2, *supra.*

ter of that case but the factual circumstances there are directly in point. For the reasons given in this Court's reading of McCarran in *Eagle County* and *Water Division 5,* the *Pacific Live Stock* result should be reached here.

B. The Procedural Relationship Between the State and Federal Statutes.

With specific reference to the pending proceedings in Water Division 7, it may be noted that in response to a motion to and an order of the Water Court for Water Division 7, service on the Attorney General of the United States of the resumé of all claims filed in that Water Court in November, 1972, was made on December 22, 1972, in accordance with the McCarran Amendment (A. 2-4). Service was also made in accordance with the Federal Rules of Civil Procedure on the United States Attorney and again on the Attorney General on January 3, 1973 (A. 5).[17]

[17] The circuit made a footnote reference to this matter after its opinion had issued but before any action on rehearing. See opinion below at Pet. App. 3a. The Jan. 3, 1973 service date was mentioned in an *ex parte* letter from the Government to the Clerk of the circuit dated October 30, 1973 (A. 24) which, however, concerned itself mostly with the Government's views of the 1969 Act. The letter construes the 1969 Act erroneously and illustrates the apparent continuing misapprehension of the Government as to the ongoing nature of adjudications under the 1969 Act. This lack of comprehension is further evident in the Brief in Opposition at the point where the Government discusses service, stating (Opp. p. 4, fn. 2):

> . . . Apparently, while there were periodical adjudications of particular claims to water in state court, no general stream adjudication had been undertaken as to the San Juan River System nor was the United States served notice of any action prior to January 3, 1973.

The statement concerning no general adjudication, in the light of the ongoing proceedings in Water Division 7, is patently in error.

(fn. cont. next page).

The United States from its participation in the proceedings in Water Divisions 4, 5 and 6, had to be aware of the ongoing proceedings in Water Division 7, which had been open at least since the issuance of a resumé of claims in October 1970. After the clear decisions in 1971 in *Eagle County* and *Water Division 5,* the Government should have availed itself of those ongoing state proceedings for the determination of its claims for water in Water Division 7.[18] At the least, when served in December 1972 with the November resumé, the Government should have filed all of its claims from whatever source derived as it is clearly required to do by the second sentence of the McCarran Amendment:

> . . . The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances:

This language leaves no room for doubt that once the Government had been served under McCarran, if

So is the statement about no service prior to January 3, 1973, but we do agree with the footnoted conclusion of the circuit that the date involved "is not outcome determinative" for the reasons noted in our discussion of *Pacific Live Stock* and other cases holding that the court of first filing need not retain jurisdiction.

[18] In this connection the district court, quite apart from whether the Government had been served, noted in its opinion (Pet. App. 19a): ". . . the United States, as it is presently doing in other water rights suits in the state courts of Colorado. . . *should initiate* action in the appropriate state court." (emphasis added).

not before, the State proceedings established under the 1969 Act were to be complied with to their full extent. The arguments by the United States that these proceedings do not constitute a general adjudication for *all* water rights were fully considered and rejected in *Water Division 5* (at 529). In addition, "the administration of such rights", in § 666(a)(2), which is so clearly implemented by the second sentence of McCarran, was emphasized by this Court in *Eagle County* (at 524) as referring to rights which were all inconclusive and encompassing appropriative, riparian and reserved rights.

Thus the State proceedings should not have been avoided in the first place through the separate filing made by the Government in the district court; nor should they have been circumvented after service by a partial filing so that claims of an identical nature to the water resources within the Division were pending in two courts. This not only contravenes the plain language of the statute, but leads directly to the vice which the Congress foresaw and tried to preclude, namely a ". . . subsequent decree . . . of little value" unless all claimants are present. The circuit clearly recognized this when it said of McCarran (Pet. App. 7a):

> . . . The Amendment's purpose was to permit complete adjudication in a state court action and to prevent frustration of the parties because of inability to obtain jurisdiction over the United States . . . .

but failed to permit the implementation of this purpose by reversing the district court. This Court should act to correct this result.

C. Only the State Proceedings Will Avoid Piecemeal Results and Produce a Fully Effective Decree.

As we have noted, one of the concerns of the district judge was that ". . . as a practical matter, retention of federal jurisdiction on some claims would result in a piecemeal solution of a larger problem." (Pet. App. 19a). He indicated that he was satisfied, in the light of the McCarran Amendment and this Court's decisions in *Eagle County* and *Water Division 5,* that deferral of federal jurisdiction to state courts was justified in order to avoid a piecemeal result.

The avoidance of piecemeal litigation on water rights was, of course, the central purpose of the McCarran Amendment. It was designed to bring in the United States in order to have a complete adjudication. This was clearly perceived by this Court in *Eagle County.* This central element, while recognized by the court below (Pet. App. 7a) was given only lip service, for that court went on to construe McCarran as narrowly as it construed abstention, concluding as to McCarran ". . . that § 666 has a very limited coverage and is perhaps only procedural." (Pet. App. 9a). This view in effect adopts some of the objections of the United States at the time that § 666 was enacted, such as the assertion that this legislation would result in . . . "piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions".[19] What has happened here as a consequence of the opinion below is exactly the opposite. Thus in according McCarran "a very limited coverage" the opinion below has assured a piecemeal result as well as a multiplicity of actions. The State proceeding, as foreseen in McCarran, would clearly avoid both of these negatives.

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[19] Hearings, *supra* fn. 13.

Of perhaps even greater concern is that the course elected by the circuit will not produce a fully effective decree. For example, Colorado's system of adjudication of water rights, in addition to bringing into the proceedings all parties within the state, provides for service on the "unknown" claimants by publication (section 37-92-302(3), C.R.S. 1973, Pet. No. 74-949, 51-52). Those with rights evidenced by prior decrees may appear or not, as they are so advised, but are nonetheless bound by the results. In sharp contrast, the proceeding instituted by the United States seeks an order requiring all defendant claimants, *known* and *unknown,* to appear, and in effect re-establish their claims,[20] without recognizing that the district court has no procedure for notifying the *unknown* claimants. The complaint below also requests the appointment of a federal water master, further complicating river administration problems by establishing a duality of river regulation and control already within the water court and water officials in Water Division 7.

This Court has had before it several cases relating to the complexities of the operation of the Colorado River interstate, including *Arizona* v. *California,* 373 U.S. 546 (1963). From such litigation the Court is aware that the Congress has adopted major pieces of legislation relating to the control of the river and to the construction of various project works to permit the beneficial use of the waters of the river.[21] Use of the waters of the river as between the states themselves as

[20] Complaint, Pet. App. 36a.

[21] These include, among others, the Boulder Canyon Project Act of 1928, 45 Stat. 1057; the Colorado River Storage Project and Participating Project Act of 1956, 70 Stat. 105; and the Colorado River Basin Project Act of 1968, 82 Stat. 885.

well as between the United States and Mexico is likewise controlled by a number of compacts as well as by statutory provisions.[22] The share allotted to each state by these compacts is divided among the users within a state by the procedures existing in each state for the adjudication and administration of water. Thus, compact requirements at Lee Ferry, Arizona, involve all users or claimants of water from all of the Colorado River tributaries within Colorado including, of course, those within Water Division 7.

There are in the Colorado River drainage in Colorado, apart from the San Juan Basin and exclusive of the claims of the United States, something in excess of 10,000 water rights. Since the compacts provide no stream by stream allocation of the share of water to which Colorado users are entitled, it is evident that the effect of claims to the use of water is not confined to the tributary drainages in which the requested rights are located. Under state procedures, interested parties outside of the water division involved are also given sufficient notice by publication, are entitled to appear, and are bound by the results unless they ap-

[22] The Colorado River Compact of 1922 approved by the Congress in 1929 in the Boulder Canyon Project Act, 45 Stat. 1057, 1064 and which was declared effective by Presidential Proclamation, 46 Stat. 3000 (see also article 61 of title 37, C.R.S. 1973), apportions the total flow of the Colorado River between the Upper Basin (principally, the States of Colorado, New Mexico, Utah and Wyoming) and the Lower Basin (principally, Arizona, California and Nevada). The Upper Colorado River Basin Compact of 1948, approved by the Congress in 1949, 63 Stat. 31 (see also article 62 of title 37, C.R.S. 1973) divides the water apportioned by the 1922 Compact among the Upper Basin states. 1922 Compact contains provisions covering releases of water to Mexico, as does the Colorado River Basin Project Act of 1968, 82 Stat. 885.

pear before the limitation period expires.[23] But under the procedure chosen by the United States here the Colorado River users located in Colorado but not named will not receive notice and consequently will not be bound. If the United States is allowed to proceed with its case, the obtaining of a piecemeal water right solution which is effective against some users, but which may not be effective against others, would throw the statewide administrative mechanism into chaos.

To our knowledge, no comparable service procedures or limitation period provisions are available in federal actions. Consequently, the decree which the United States seeks to have issued by the federal district court cannot be fully effective and would necessarily result in further litigation and the multiplicity of actions Congress sought to avoid by McCarran.

Finally, the inadvisability of two procedures in this field was strongly urged by the Government itself in testifying against the proposed legislation leading to the enactment of § 666. Senator McCarran's bill as introduced contained a proviso that the United States would have the right of removal of any such suit to a federal court. As a "first point" against the bill as drafted, the spokesman for the Justice Department referred to the provision for removal to a federal court and observed:

> . . . But if this legislation as now written is enacted, you will have *two procedures* in existence in the State, and it would be a serious detriment

[23] The 1969 Act at section 37-92-304(10) C.R.S. 1973, set out at Pet. No. 74-949 at p. 55, limits the period when an adversely affected person may petition the court for redress to three years.

> to the small water user here if he were to sue the United States and we were to remove over here to the city and county of Denver, and he would have to come across the mountain to protect his rights. I don't think that is desirable at all . . . [24] (emphasis added)

In reporting the bill the Committee adopted this suggestion and eliminated the removal provision.

The suit filed here by the Government in the district court in Denver was of course not a removal.[25] It was however an attempt to avoid an established, ongoing State proceeding and resulted in two procedures which Justice itself had counselled Congress two decades before to avoid.

CONCLUSION

In sum, the aims of the McCarran Amendment may be said to be close to the aims of abstention itself. The McCarran Amendment sought to permit the adjudication of all claims to water in one proceeding; sought to avoid piecemeal litigation over a precious natural resource; sought to avoid the migration of citizens to a removed forum to defend against federal claims, while engaging in an imperfect procedure; and to avoid the disruption of a long-evolved state procedure for the administration of a vital resource. All of these goals we thought were achieved in *Eagle County* and

[24] Hearings on S. 18, *supra*, at 5.

[25] If removal is prohibited the question arises whether a direct suit is permissible.

Water Division 5, and we urge their retention through the reversal of the opinion below.

Respectfully submitted,

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July 12, 1975

Supreme Court, U. S.
FILED
OCT 1 1975
MICHAEL RODAK, JR., CLERK

Nos. 74-940 and 74-949

In the Supreme Court of the United States

OCTOBER TERM, 1975

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

MABY AKIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-940

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 74-949

MARY AKIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. No. 74-940, 1a-15a; Pet. App. A, No. 74-949, 19-33) is reported at 504 F. 2d 115. The oral opinion of the district court (Pet. App. No. 74-940, 17a-21a; Pet. App. B, No. 74-949, 34-41) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1974. A timely petition for rehearing was denied on November 12, 1974. The petitions for writs of certiorari were filed on January 30, 1975, and February 1, 1975, respectively, and were granted on April 28, 1975. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the McCarran Amendment, 66 Stat. 560, 43 U.S.C. 666, which consents to the joinder of the United States as a defendant in general water adjudications, repealed by implication the jurisdiction of the federal district courts under 28 U.S.C. 1345 over suits by the United States for determination of water rights brought by it as trustee for certain Indian tribes, and as owner of various non-Indian government claims.

2. Whether the doctrines of abstention and comity permitted the district court to dismiss such an action filed by the United States and thereby to remit the claims involved, most of which are governed by federal law, to an after-filed state proceeding.[1]

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[1] If the Court disagrees with the government's contentions that the district court has jurisdiction, and that the doctrines of abstention and comity are inapplicable, then we believe it will become necessary for the Court to consider a third question alluded to in the government's brief in opposition to the petitions for writs of certiorari (pp. 10–12): whether the McCarran Amendment subjects Indian water rights for which the United States is trustee to the jurisdiction of state courts. This issue was raised, but not reached in the court below. See n. 8, p. 9, *infra*. This Court may consider it under the general principle that a judgment may be partially or entirely sustained on appeal on any ground, legal or factual, supported by the record. *Dandridge* v. *Williams*, 397 U.S. 471, 475, n. 6; *United States* v. *Carignan*, 342 U.S. 36, 38, n. 1.

STATUTE INVOLVED

The McCarran Amendment, Section 208, Department of Justice Appropriation Act, 1953, 66 Stat. 560, 43 U.S.C. 666, provides:

> (a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.
>
> (b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

(d) None of the funds appropriated by this title may be used in the preparation or prosecution of the suit in the United States District Court for the Southern District of California, Southern Division, by the United States of America against Fallbrook Public Utility District, a public service corporation of the State of California, and others.[2]

STATEMENT

This case involves claims by the United States as trustee for two Indian tribes, and in its own behalf, to use of the waters of the San Juan River and its tributaries, to the extent they flow through the southwest corner of the State of Colorado. A map showing the area and rivers involved is enclosed with this brief.

The San Juan River originates west of the continental divide in Colorado, but most of its 360-mile course is gradually westward through New Mexico and Utah, where it joins the Colorado River at Lake Powell. Tributary to the San Juan are a number of rivers rising in the mountains of southwestern Colorado, and generally flowing south or southwest through that State to join the San Juan in New Mexico. Among these are the Mancos, LaPlata, Animas, Florida, Los Pinos, Piedra and Navajo rivers. The entire system constitutes the San Juan basin, the principle watershed within Colorado's Water Division No. 7, as defined in that State's Water Right Determination and Administration Act of 1969, Colo. Rev. Stat. 37–92–201(1)(g) (1973). The system also drains the Ute Mountain Ute and Southern Ute Indian Reservations, which together occupy a strip of land in Colorado approximately 110 miles long, and 10 to 25 miles wide, running along the Colorado-New Mexico border from the Four Corners area[3] on the west to an eastern boundary in Archuleta County, Colorado. The San Juan National Forest also covers a substantial portion of the area north of the reservation.[4]

On November 14, 1972, the United States filed this civil action in the United States District Court for the District of Colorado "to have its rights and the rights of the Ute Mountain Ute and Southern Ute

[2] Section 208(d) is not reproduced in the United States Code.

[3] The junction of Colorado, New Mexico, Utah and Arizona.

[4] Also within Water Division No. 7 is the drainage basin of the Dolores River. The Dolores rises on the western slope of the Rockies, then curves gradually to the northwest to become a tributary of the Colorado in Utah.

The government has asserted claims to the waters of the Dolores in Colorado's District Court for Water Division No. 7, based upon Executive Orders creating the San Juan National Forest. Similar claims involving streams in the San Juan basin, which drain other parts of the Forest, have been joined with the Indian and non-Indian government claims asserted in the federal district court in this case. Petitioners' suggestion (Br. 6, n. 7) that the United States has improperly split its national forest claims between the state and federal courts overlooks the fact that its Dolores River claims involve a watershed geographically separate from the San Juan Basin, and do not involve Indian water rights. No Indian rights are involved in proceedings in other Colorado water divisions to which the United States is a party.

Indian tribes in and to the use of the waters [of the San Juan and its tributary rivers [5] in the State of Colorado] determined and declared" (Pet. App. 21a, 30a–31a). Jurisdiction was invoked under 28 U.S.C. 1345, which provides that "the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States * * *" (Pet. App. 31a). The complaint named, in alphabetical order, approximately 968 defendants, as well as all unknown claimants of interests in the waters involved (Pet. App. 21a–30a). Among these were certain water conservation districts that supply water to users.

The complaint alleged on behalf of the two Indian tribes that their present reservations were part of a larger reservation withdrawn and reserved for their use by the Ute Reservation Treaty of March 2, 1868; and that in fulfillment of the purposes for which the reservation was created, the waters in and on that reservation, including surface, ground and underground waters that were unappropriated on that date and that are or will become reasonably necessary for the present and future needs of the Indians, were withdrawn from private appropriation (Pet. App. 31a).

The complaint also set forth non-Indian claims of the United States. These included claims of reserved rights asserted to arise from: the establishment of the Mesa Verde National Park in 1906, the Yucca House National Monument in 1919, and the Hovenweep National Monument in 1928 (Pet. App. 32a–33a); the

[5] The Mancos, LaPlata, Animas, Florida, Los Pinos, Piedra and Navajo rivers.

reservation for public watering purposes of certain holes and springs located within the watersheds of the rivers (Pet. App. 33a); and the San Juan National Forest, as set aside for national forest purposes by a series of presidential proclamations beginning in 1905 and ending in 1947 (Pet. App. 34a–35a).

In addition, the complaint claimed priority in the right to use waters on certain lands administered by the Bureau of Land Management dating from the initiation of the various uses (Pet. App. 33a); priority for certain reclamation projects from the date the projects were initiated (Pet. App. 34a); and certain Indian rights to the use of waters of the Pine (Los Pinos) River as previously decreed by the federal district court in *United States* v. *Morrison Consolidated Ditch Co.*, D. Colo., Equity No. 7736, decided October 25, 1930 (Pet. App. 35a).

The complaint further alleged that the defendants claimed rights adverse to the rights of the United States and the Indian tribes and prayed for a decree adjudicating the reserved rights and priorities claimed. It also asked the court to appoint a water master to administer the waters adjudicated in the proceeding (Pet. App. 36a–37a, 40a).

Certain entities, not within the watershed of the San Juan, intervened [6] (A. 6–7).[7] After the complaint was served, defendant No. 812, the Southwestern

[6] The Colorado River Water Conservation District, the City and County of Denver, and Southeastern Colorado River Water Conservation District.

[7] "A." refers to the printed appendix in this Court.

Colorado Water Conservation District, filed an application in the Colorado State District Court for Water Division No. 7 requesting an order directing service of process on the United States under the McCarran Amendment, 66 Stat. 560, 43 U.S.C. 666, on the ground that the United States had filed this action in the federal district court (A. 2–3). On December 21, 1972, the state water judge ordered served on the United States a resumé of all water applications in Water Division No. 7 that had been filed during the month of November 1972 (A. 3). The Clerk for Water Division No. 7 mailed the resumé the following day (A. 4), and it was received by the Attorney General on January 2, 1973, and by the United States Attorney for the District of Colorado by personal service on January 3, 1973.

In the federal proceeding, motions to dismiss were filed by various party-defendants contending that the district court lacked jurisdiction because the McCarran Amendment, 66 Stat. 560, 43 U.S.C. 666, vested exclusive jurisdiction over water rights in the state courts; and that all claims by the United States should be asserted in the state water proceeding to which it had been made a party after the complaint was filed in federal court (*e.g.*, A. 10–11).

The district court announced its rulings on the motions to dismiss from the bench. It found it unnecessary to decide whether the state court had exclusive jurisdiction because it was satisfied under the doctrines of abstention and comity that it should defer to the state water court. It noted that the United

States has been served or was being served in Water Division No. 7, that the McCarran Amendment, 43 U.S.C. 666, waives the United States' immunity from suit in the state courts, and that the United States had filed claims in other water divisions in Colorado. The state proceedings, in the district court's view, were more convenient for local water users; the state courts are experts in Colorado water laws; deferring to the state court would avoid piecemeal litigations; and the state court can also vindicate federal rights (Pet. App. 17a–21a).[8]

On appeal by the United States, the court of appeals reversed. It held that the district court had jurisdiction and should not have abstained. In the court's view, the McCarran Amendment does not impliedly repeal the district court's jurisdiction under 28 U.S.C. 1345 over water rights claims aserted by the United States; rather, the Amendment was intended only to waive sovereign immunity. Its "purpose was to permit complete adjudication in a state court action and to prevent frustration of the parties because of inability to obtain jurisdiction over the United States" (Pet. App.

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[8] The United States filed a motion for reconsideration supported by the National Tribal Chairmans Association and the Native American Rights Fund as *amicus curiae*. Both in the district court and the court of appeals, the latter contended that state courts do not have jurisdiction over reserved Indian water rights. The United States argued that the doctrine of abstention was not applicable in any event, and that there is a serious question, whch need not be reached, whether the state courts have jurisdiction to adjudicate Indian water rights. The district court examined these contentions but declined to review its ruling. The court of appeals did not reach them.

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7a), which was not sufficient to find a repeal by implication of Section 1345.

Abstention, the court further ruled, was inappropriate in the circumstances of this case, which involves no constitutional questions that could be avoided by a state court's decision on a state law question; no interference with a state regulatory agency by premature decision of a federal constitutional question; and no novel or important issues of state law. When state and federal courts have concurrent jurisdiction over property questions, the court noted, priority in filing is recognized. Moreover, when the United States, as a plaintiff, seeks to establish rights of a national and sovereign character, this militates against abstention. Finally, the court held that *United State* v. *District Court for Eagle County,* 401 U.S. 520, does not even suggest abstention is appropriate; rather, it recognizes that reserved water rights claims of the United States present federal questions (Pet. App. 1a–15a).

INTRODUCTION AND SUMMARY OF ARGUMENT

A. INTRODUCTION

Since the Judiciary Act of September 24, 1789, 1 Stat. 73, which gave the lower federal courts original jurisdiction over suits by the United States, the federal government has been entitled to sue as plaintiff in its own courts for the adjudication of any civil claims it may wish to assert. This jurisdiction is one of the indispensable categories in even a minimum model for a federal judicial system. From the beginning it was recognized that the federal government required a judi-

cial machinery for enforcing its own claims and safeguarding its agents against the obstructions and prejudices of local authority. See Hart and Wechsler's, *The Federal Courts and the Federal System* 14, 28–29, 34, 1293–1295 (2d ed. 1973).[9] In its present form, 28 U.S.C. 1345, this jurisdiction extends to civil claims by the United States of every nature, including suits to determine water rights owned by the United States or held by it as trustee for Indian tribes. This Court recently so held in *United States* v. *Nevada,* 412 U.S. 534, an original suit filed by the United States for the purpose of determining reserved water rights to protect the Indian fishery at Pyramid Lake, Nevada. The Court declined to exercise its original jurisdiction, however, holding instead that "the existence and extent of the prior water rights of the United States with respect to the Pyramid Lake Indian Reservation is within the jurisdiction of the District Court." 412 U.S. at 538.[10]

Nevertheless, petitioners claim here that by waiving sovereign immunity in the McCarran Amendment, 43 U.S.C. 666, and permitting joinder of the United States as a defendant in water suits, Congress either repealed by implication the affirmative jurisdiction of the federal courts under 28 U.S.C. 1345; or, at least,

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[9] See also Friendly, *Federal Jurisdiction: A General View* 9 (1973) (quoting from Frankfurter & Landis, *The Business of the Supreme Court* (1928).

[10] To the extent that disputes with California might arise "with respect to United States water uses in that State" the Court also held that they could "be settled in lower federal courts in California." 412 U.S. at 539–540.

indicated that the federal courts were to defer jurisdiction to the state courts in water rights disputes under the doctrines of abstention and comity. As a practical matter, there is no difference between the contentions. Abstention in cases where the United States is subject to suit in state court under the McCarran Amendment would amount, in effect, to a repeal of the district court's jurisdiction. At the least, it would deprive the United States of the right to choose a federal forum for the adjudication of federal claims since, according to petitioners, the United States can be forced to litigate in a state court if the state joins the federal government in the state proceedings after the filing of the federal suit.

Petitioners' arguments must be assessed against the claims alleged by the United States in the complaint. For the most part, the claims are under the federal reserved rights doctrine, not under state water law. Colorado, like most other western States, applies the appropriative rights doctrine to the use of water.[11] That doctrine is a product of the practices developed in mining, and extended to irrigation by settlers in the dry western States. Under it, a party acquires an enforceable legal right to use water only upon actually diverting it from its natural source and applying it to a beneficial use.

This water right dates from the actual diversion (state law may grant conditional rights while diversion facilities are constructed), and has priority over subsequent rights in periods of shortage. It survives only so long as the water is put to an actual beneficial use. See *Arizona* v. *California,* 373 U.S. 546, 555–556.

In contrast to the western States' law of prior appropriation[12] is the federal reserved rights doctrine originally applied to Indian reservations in *Winters* v. *United States,* 207 U.S. 564, and held to be equally applicable to non-Indian federal establishments in *Arizona* v. *California, supra,* 373 U.S. at 601. The reserved rights doctrine traces its origin to the right of the United States, as owner of the public lands, to the beneficial use of the waters therein. See *Winters* v. *United States, supra,* 207 U.S. at 577; *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 703. Under these decisions the United States as trustee of the property of reservation Indians, and as owner of other types of reservations, is deemed to have reserved, at the time it withdrew the lands from private appropriation, sufficient water to achieve the purpose for which the lands were set aside. Such reserved federal water rights, as this Court held in *United States* v. *District Court for Eagle County,* 401 U.S. 520, 526, arise under federal law.

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[11] *Coffin* v. *Left Hand Ditch Co.*, 6 Colo. 443; Colo. Constitution, Art. XVI, Secs. 5, 6; Colo. Rev. Stat. 37–92–102 (1973); see generally National Water Commission, *A Summary-Digest of State Water Laws*, Part II, Chap. 6 (1973).

[12] The appropriative rights doctrine contrasts with the other principal state water doctrine, based on riparian rights, which obtains chiefly in the plentifully watered eastern states. The riparian doctrine permits a landowner whose property abuts a body of water to make a reasonable use of the water so long as he does not interfere with other riparians. See Trelease, *Water Law* 10–13 (2d ed. 1974); *Summary-Digest*, *supra*, n. 11, at Part I, pp. 3–8.

Federal reserved rights differ from state appropriative rights in that they are not created by permits or adjudications in conformity with state procedures; they do not depend upon actual diversion to a beneficial use; they are not terminated by abandonment; the quantity of water involved depends on the purpose of the reservations; and the priority dates from the time the land was withdrawn for national purposes.

Because the principal claims by the United States in this case involve claims of reserved water rights on behalf of Indians and on behalf of the United States in its own right, it is particularly appropriate that these claims be adjudicated by the federal district courts. As we discuss below, the McCarran Amendment did not change, for water rights, the fundamental decision of the First Congress that suits by the United States were among "those causes which are manifestly proper for the cognizance of the national judicature." *The Federalist* No. 81, quoted in Hart and Wechsler, *supra,* at 29.

B. SUMMARY OF ARGUMENT

1. The McCarran Amendment does not repeal by implication the historic jurisdiction of the federal courts over suits by the United States under 28 U.S.C. 1345.

On its face the Amendment sets forth only a waiver of sovereign immunity and neither confers nor repeals jurisdiction. Its limited purpose—to remove the bar of sovereign immunity in order to permit determination of water rights owned and used by the federal government—is achieved as effectively when the United

States sues in federal court as when it is joined as a defendant in state courts.

The legislative history gives no indication that Congress intended to preclude the United States from asserting water rights claims in its own courts. Not even a hint of such a purpose appears in Senator McCarran's descriptions of his bill, or the Senate Report on it (S. Rep. No. 755, 82d Cong., 1st Sess. (1951)), or the proceedings in the Senate, which substituted Senator McCarran's bill for a more drastic restriction in the House-passed 1953 appropriation for the Department of Justice. While a Department of Justice witness predicted in testimony opposing the legislation a series of adverse consequences if the bill were enacted, even he did not indicate that the bill would repeal the government's right to sue affirmatively. In any event, testimony in hearings by zealous opponents of legislation is not authoritative.

The unexplained elimination from Senator McCarran's original proposal of a provision permitting removal from state to federal courts concerned only water rights suits in which the United States is joined as a defendant, not the original jurisdiction of the district courts under Section 1345. And finally, when the McCarran Amendment was before Congress, there were also pending a number of proposals, including one passed by the House of Representatives, which would have barred federal officials from asserting any water rights except in conformity with state law. Congress instead adopted the limited waiver of immunity in the McCarran Amendment.

Repeals of federal statutes by implication are disfavored and will be found only in the face of irreconcilable conflict between an earlier and a later act of Congress. The only possible conflict to which petitioners point (which is illusory, as we discuss later) is between the federal courts' historic jurisdiction over affirmative suits by the United States, and the provisions of Colorado's 1969 water rights act. Federal statutes, especially basic jurisdictional grants, are not repealed by implication from later state laws. Petitioners' arguments, which for these cases would repeal both Section 1345, and the federal question jurisdiction of Section 1331(a), which the United States could also invoke, were properly rejected by the court of appeals.

2. Neither the doctrines of abstention nor comity warrant refusal by a federal district court to exercise its jurisdiction over a government water rights suit [illegible] in deference to an after-filed proceeding in state court. Such an approach would permit defendants in every federal water rights suit to remove it to state court by answering the complaint with a proceeding naming the United States a defendant in state proceedings. A federal court with jurisdiction over a suit by the United States turning on nonconstitutional federal law, and involving no controlling, unsettled doctrines of state law, should not abstain in order that the state courts may decide the federal issues subject to ultimate review in this Court.

Abstention is an exception to federal jurisdiction and is carefully limited to special circumstances. It is invoked only in cases turning on unsettled issues of

state law, when state law or state administrative action is directly challenged under the federal Constitution, and authoritative construction of the state law by the state courts might avoid decision of the constitutional question; or when abstention would avoid federal formulation of state policy by allowing the state courts the initial opportunity to review state agency action under state law. The Indian and federal government water rights claims in this case turn on federal law under the reserved rights doctrine defined in *Winters* v. *United States*, 207 U.S. 564, and *Arizona* v. *California*, 373 U.S. 546, 595–601. No challenge to state administrative action is involved. This case is thus governed by the rule that recognizes the right of the plaintiff in a civil case to choose a federal forum, when there is a choice, even if the issues are of substantial local interest. This rule is historically appropriate where the United States is the plaintiff.

The doctrine of comity defined in *Younger* v. *Harris*, 401 U.S. 37, is also inapplicable. It is founded on the traditional rule against interference by federal courts in a state's enforcement of its criminal laws, and on the view that federal-state relations are enhanced when state courts are permitted to make the initial decision on the constitutionality of state laws.

3. There are a number of practical benefits resulting from affirmative water rights suits by the United States in federal court. First, unlike the state courts, the federal courts have undoubted jurisdiction over Indian water rights held by the United States as trustee. Thus, a federal suit permits a complete ad-

judication of water rights held by the government for its wards, as well as those owned for federal use.

Second, the federal proceeding permits determination of the complicated issues of federal law involving Indian and federal government water rights by an experienced federal tribunal, expert in construing Indian treaties and federal land laws and orders. Injection of such issues into state court proceedings confronts state water judges with issues alien to the simpler questions of priority under state law customarily arising in state water adjudications. Because of their complexity, the federal issues must be separated from the ordinary proceedings in any event. This separation is conveniently accomplished when such issues are raised by the United States as plaintiff in federal court.

Third, such federal suits can be appealed from the district courts to the federal courts of appeals, thus relieving the burden on this Court, which would otherwise be the only federal forum for appellate review of the federal issues.

Fourth, once the Indian and government water rights have been determined by the federal court, its decree can be integrated into the overall tabulation of past decrees to be incorporated into state general adjudications, just as past state decrees are included. Indeed, Colorado's Water Right Determination and Administration Act of 1969 provides both a month-by-month procedure for the determination of new applications for water rights, and a procedure for overall tabulation of all decreed rights, including federal decrees, for each stream and watershed. By 1982 these

tabulations are to be completed and then confirmed by an overall decree in each state Water Division, which will complete the state's process of general adjudication.

4. The Court need not decide whether the state courts have jurisdiction over Indian water rights held by the United States as trustee unless it concludes that the district courts do not have jurisdiction over government suits for non-Indian water rights under 28 U.S.C. 1345, or that the doctrines of abstention and comity permit the district courts to refrain from exercising that jurisdiction in order to remit water rights claims by the United States in its own behalf to the state courts. Historically, Indians have had a special relationship with the federal govenment devolving from their aboriginal sovereign status to their present condition as wards of the nation. In performing its fiduciary obligation to protect Indians' tribal rights and property, Congress has permitted the states to exercise civil jurisdiction over Indians only by express enactments adopted after careful consideration, and subject to precise limitations. The McCarran Amendment does not mention Indian water rights, and its history does not reflect a comprehensive consideration of the subject. Moreover, a year after adopting the Amendment, Congress passed Pub. L. 280 (Act of August 15, 1953, 67 Stat. 589), which expressly excluded from its authorization of civil jurisdiction by the States the power to adjudicate Indian water rights held by the United States as trustee. Such rights therefore can be put in issue only in suits by the United States as plaintiff on benalf of the Indians under 28 U.S.C. 1345.

ARGUMENT

I

THE McCARRAN AMENDMENT DID NOT BY IMPLICATION REPEAL THE RIGHT OF THE UNITED STATES TO SUE IN THE FEDERAL DISTRICT COURTS FOR A DETERMINATION OF WATER RIGHTS CLAIMED BY INDIAN TRIBES AND BY THE GOVERNMENT

A. ON ITS FACE THE AMENDMENT'S LANGUAGE DISCLOSES NO PURPOSE OTHER THAN TO WAIVE SOVEREIGN IMMUNITY

The McCarran Amendment expresses no purpose other than to grant consent for the joinder of the United States as a defendant in suits for the adjudication of water rights of which it is the owner, or which it is in the process of acquiring. The Amendment makes no reference to the role of the United States as a plaintiff in such suits. Although it refers to state law, it does not distinguish between state and federal courts. Moreover, unlike other statutes waiving sovereign immunity,[13] it contains no grant of jurisdiction to any court. At most, it enables the state courts to exercise jurisdiction, *concurrent* with the federal courts, over water rights suits involving the United States, by permitting the United States to be joined as a defendant in state proceedings. But this permission to join the United States is scarcely a declaration that the United States can assert its claims as plaintiff or defendant only in conformity with state procedures in state courts.

[13] See, *e.g.*, the Tucker Act, 28 U.S.C. 1346(a); the Federal Tort Claims Act, 28 U.S.C. 1346(b); and 28 U.S.C. 2410 (actions affecting property on which the United States has a lien).

Even as a waiver of immunity, the McCarran Amendment is limited. It does not authorize the joinder of the United States in original suits in this Court involving the right of States to use the water of any interstate state stream (Section 208(c)); and it is confined to suits for a general adjudication of water rights—that is, a comprehensive proceeding in which the relative rights of all parties claiming water from a stream or other source are adjudicated *inter sese,* as distinguished from a proceeding in which one party is seeking to establish or defend its rights. *Dugan* v. *Rank,* 372 U.S. 609, 617–619.[14]

In addition, the Amendment purports to waive sovereign immunity only when it appears that the United States is the owner or is in the process of acquiring the water rights. It makes no mention of Indian rights (see discussion, *infra,* pp. 52–62).

The Amendment's language and limitations thus indicate its limited purpose: to assure that the sovereign immunity of the United States could not be asserted to prevent a complete determination of all rights to use a stream in the process of general adjudication prevailing in many states. See *United States* v. *District Court for Eagle County,* 401 U.S. 520; *United States* v. *District Court for Water Div. No. 5,* 401 U.S. 527. As the court below stated, the Amendment was intended "to prevent frustration of the parties because of inability to obtain jurisdiction over the United States" (Pet. App. 7a).

[14] This suit, which seeks only to establish the rights of the United States, is not a general adjudication within the meaning of *Dugan* v. *Rank*, *supra*.

When, as here, the United States sues as plaintiff, in a federal court, that purpose is satisfied, for the basic issue to be litigated under the McCarran Amendment—the existence and extent of federal, non-Indian "appropriative rights, riparian rights, and reserved rights" (*Eagle County, supra,* 401 U.S. at 524)—is laid before the court as effectively as when the United States is joined as a defendant under the McCarran Amendment.

This is confirmed by the final section. The McCarran Amendment is so called because it was adopted as an amendment to the Department of Justice Appropriation Act, 1953, 66 Stat. 560. Subsection (d) of the Amendment barred the use of appropriated funds "in the preparation or prosecution of the suit in the United States District Court for the Southern District of California, Southern Division, by the United States of America against Fallbrook Public Utility District * * * and others." This limitation arose out of claims by the United States to the use of water from the Santa Margarita River for the Marine Base at Camp Pendleton, California.[15] See discussion, *infra,* pp. 27–28. If the McCarran Amendment had repealed the jurisdiction of the federal district courts under 28 U.S.C. 1345 to entertain suits by the United States for the determination of water rights, it would have been unnecessary for Congress to bar the use of Department of Justice funds to carry on the Santa Margarita litigation.

[15] See *United States* v. *Fallbrook Public Utility District*, 101 F. Supp. 298; 108 F. Supp. 72; 109 F. Supp. 28 (S.D. Cal.).

B. THE LEGISLATIVE HISTORY CONFIRMS THE AMENDMENT'S LIMITED PURPOSES

The legislative history of the McCarran Amendment further confirms that, as proposed and enacted, the bill's only purpose was to permit involuntary joinder of the United States as a defendant in general adjudications of water rights. This narrow legislation was enacted in preference to other legislation which would have expressly barred the government from federal courts in water cases. The option of an affirmative suit by the United States under 28 U.S.C. 1345 was thus preserved.

As introduced by Senator McCarran at the opening of the 82d Congress (S. 18, 82d Cong., 1st Sess., 97 Cong. Rec. 86 (1951)), the bill expressed only a consent to joinder of the United States as a defendant in water right suits in words identical to the statute as finally enacted.[16] As introduced, S. 18 also contained a proviso expressly providing for removal of such suits to the federal district courts.

The Senate conducted hearings on S. 18,[17] and petitioners place their principal reliance on them. They particularly emphasize the testimony of the Department of Justice representative, William H. Veeder, then a Special Assistant to the Attorney General. Mr. Veeder strongly opposed the bill, contending in the

[16] A predecessor to S. 18 was introduced by Senator McCarran in the preceding Congress on July 21, 1949. S. 2305, 81st Cong., 1st Sess., 95 Cong. Rec. 9918. No action was taken on this bill.

[17] Hearings on S. 18 ("Adjudication of Water Rights" before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess. (1951) (hereinafter, "Senate Hearings").

broadest possible terms that it would lead to a series of consequences which would disrupt amicable state-federal relations in water matters, create enormous litigation problems, and threaten loss of a wide range of invaluable federal water rights. The Department of the Interior also opposed the bill.[18]

[18] Mr. Veeder argued that the bill was unnecessary because, when negotiations failed, federal claims were usually determined in affirmative suits brought by the United States as plaintiff in federal court, or by special appearance in state court, at the request of interested private parties (Senate Hearings 2, 3). A major concern, reflected in the questions of Senator Watkins of Utah, was that this remedy, which depends upon the discretion of executive officers, was uncertain (*id.* at 7, 18). Mr. Veeder also contended that the bill's removal provision would lead to a dual procedure in which federal courts superseded the existing state procedure, and would require the small user to litigate, for example, in Denver, where the federal court sits, instead of in his local tribunal. He also contended that the bill would lead to a multiplicity of suits that would require the United States to prove its forestry, reclamation, Indian, and soil conservation rights in one suit, or risk a determination of *res judicata* for having split its cause of action (*id.* at 5–7).

By letter to the Committee, the Department of Justice, over the signature of Deputy Attorney General Ford, confined its opposition to the contention that a general waiver would result in piecemeal adjudications and a multiplicity of actions (*id.* at 66).

In its letter, the Department of the Interior pointed to the wide variety of federal water interests, ranging from Commerce Clause and Indian rights, to such matters as national parks and reclamation. It recommended that any waiver of immunity should be limited to rights claimed under state law in a general adjudication, or in judicial review proceedings of state administrative proceedings invoked by federal officials. This proposal was to be further limited by barring equitable relief or costs against the United States; and by providing that the United States would not be prejudiced by prior decrees to which it was not a party, and that the waiver should not extend to rights asserted by the United States for and on behalf of Indians (*id.* at 67–68).

There is no indication in either submission that opponents of the bill in the executive branch believed that affirmative suits by the United States were foreclosed. The statements in opposition were confined to the wisdom of waiving the government's immunity to suit.

In any event, the testimony and letters before the Senate Committee are of little assistance in ascertaining the intent of Congress. The Court has frequently warned against reliance on testimony in committee hearings, except for precise analyses of statutory phrases by sponsors of the proposed laws. *S & E Contractors, Inc.* v. *United States,* 406 U.S. 1, 13, n. 9. The Court also has "often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. 'The fears and doubts of the opposition are no authoritative guide to the construction of legislation.' " *National Labor Relations Board* v. *Fruit Packers,* 377 U.S. 58, 66.

Neither Mr. Veeder's testimony nor the opposition letters submitted by the Departments of Justice and Interior persuaded the Senate Committee. It favorably reported the bill (S. Rep. No. 755, 82d Cong., 1st Sess. (1951)), and recommended its passage as amended in the Committee. The precise purpose of the bill was concisely stated (S. Rep. No. 755, *supra,* at 5):

> Congress has not removed the bar of immunity even in its own courts in suits wherein

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> water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.

The provision permitting removal (p. 23, *supra*) was eliminated without comment. The principal amendments were addition of a proviso, suggested by the National Reclamation Association (Senate Hearings 32), barring joinder of the United States as defendant in suits before this Court involving the right of States to use the water of any interstate stream; and a provision, suggested by Senator Magnuson, calling for a complete catalogue of federal water rights (S. Rep. No. 755, *supra,* at 6).

The report gave no indication that it considered Mr. Veeder's rather extreme characterizations of the bill's effects to be accurate. Instead, it simply declared (S. Rep. No. 755, *supra,* at 2): "The committee has taken note of the reports of the Department of Justice and the Department of the Interior printed below which oppose the legislation, but has concluded, after a consideration of all of the evidence available to the committee, that the legislation is meritorious." These reports were the letters the agencies had sent (n. 18, *supra,* p. 24).

There was no debate on the Senate floor. In attempts to obtain unanimous consent for its consideration, Senator McCarran explained the bill in terms substantially identical to the Senate Report. 97 Cong. Rec. 12391, 12947–12948 (1951). After objections to its consideration were withdrawn (98 Cong. Rec. 7793

(1952)), it was taken up by the Senate. The Committee amendments were adopted, and the bill was passed without comment. 98 Cong. Rec. 7817–7818 (1952).[19]

No action was taken on S. 18 in the House until it was ultimately substituted for Section 208 of H.R. 7289, 82d Cong., 2d Sess. (1952), which included the 1953 Department of Justice Appropriation Act. When that bill reached the floor of the House, Congressman Yorty of California (who had appeared before the Senate Committee to explain his opposition to the government's Santa Margarita litigation (Senate Hearings 37–44), proposed an amendment to bar the use of funds to be appropriated "in the preparation or prosecution of any suit or proceeding in any court by or on behalf of the United States (1) against a state of the Union; or (2) against in excess of twenty-five hundred defendants." 98 Cong. Rec. 3555 (1952). This proposal was adopted as part of the appropriation bill by the House. 98 Cong. Rec. 3556, 3562–3563 (1952).

When the appropriation bill came before the Senate Appropriation Committee, S. 18 was discussed in connection with general water rights problems.[20] Without explanation the Senate Report on the appropriation bill (S. Rep. No. 1807, 82d Cong., 2d Sess. 10 (1952))

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[19] S. Rep. No. 755 was supplemented by a Part 2 clarifying the phrasing of the proviso barring joinder of the United States in this Court. S. Rep. No. 755, Part 2, 82d Cong., 2d Sess. (1952).

[20] Hearings on H.R. 7289 ("Department of State, Justice, Commerce and the Judiciary Appropriation for 1953") before the Subcommittee of the Senate Committee on Appropriations, 82d Cong., 2d Sess. 1349–1350, 1802–1807 (1952).

recommended that S. 18 be substituted for Section 208 of the House Appropriation Bill. Senator McCarran offered S. 18 as an amendment from the floor (98 Cong. Rec. 7893 (1952)),[21] and it was adopted, with an addition proposed by Senator Knowland, implementing Congressman Yorty's proposal barring the use of funds appropriated in the bill to finance the Santa Margarita litigation (98 Cong. Rec. 8110 (1952)).

As already noted (p. 22, *supra*), the Knowland addition would have been unnecessary if other provisions of the McCarran Amendment had been intended to foreclose affirmative suits by the United States.[22]

Far from indicating a purpose to deprive the United States of access to federal courts in water rights matters, the history shows that Congress declined to enact such proposals. First, in the Senate Hearings the National Reclamation Association affirmatively urged legislation requiring the United States to assert its claims in state proceedings and nowhere else (Senate Hearings 22). Second, there was pending in the House, at the time S. 18 was before it, legislation (H.R. 7691, 82d Cong., 2d Sess. (1952)) expressly requiring federal officers to act only in conformity

[21] The Amendment, however, did not include Section 2 of S. 18 directing the Secretary of Interior to list all federal water rights.

[22] After several unsuccessful conferences on the appropriation bill (H.R. Conf. Reps. Nos. 2454 and 2485, 82d Cong., 2d Sess. (1952)), the House accepted the Senate version (98 Cong. Rec. 9445–9446 (1952)). Despite opposition on the floor by Congressman Rooney principally addressed to the Santa Margarita restriction contained in Section 208, that provision remained in the bill (98 Cong. Rec. 9445–9446 (1952)); the bill as adopted was approved by the President as Pub. L. 495, 82d Cong., 66 Stat. 549, 560.

with the procedures provided by state law and no other; and declaring that the United States "shall sue and be sued in the State courts." To the same effect was H.R. 5735, 82d Cong., 1st Sess. (1951), which would have required federal officers to "proceed in conformity with" the water law of the western states, and which was intended "to make it unmistakably clear that * * * jurisdiction * * * is subject to the laws of the affected state * * *." H.R. Rep. No. 1452, 82d Cong., 2d Sess. 2 (1952). Finally, the House passed a bill, H.R. 5368, 82d Cong., 1st Sess. (1951), which, in Section 4, required federal officers to "proceed in conformity with the laws [of the] States * * *," (98 Cong. Rec. 5046–5055 (1952)); but this bill was not adopted by the Senate.

Congress thus had before it a number of proposals that would have expressly cut off the right of the United States to assert its water rights in the federal courts, but it adopted the narrower provisions of the McCarran Amendment, which simply waived sovereign immunity.[23]

[23] The limited nature of the McCarran Amendment dissatisfied many in the western states. It was followed by repeated proposals in succeeding Congresses to bar federal officers and agencies from asserting claims for water rights except in conformity with state law, and to place limitations on the reserved rights doctrine. See Morreale, *Federal-State Conflicts Over Western Waters: A Decade of Attempted "Clarifying Legislation,"* 20 Rutgers L. Rev. 423 (1966). In 1968 Congress created the National Water Commission to review and report on nationwide water resources problems. National Water Commission Act, 82 Stat. 868. Its report, submitted in 1973, recommended a "National Water Rights Procedures Act" which would require the United States to proceed in conformity with state law, subject to review of state trial court or administrative orders in the federal

Petitioners contend (Br. 34–35) that the elimination of the removal provision in S. 18 signifies that Congress intended to bar affirmative suits by the United States. At most it indicates that once the United States is joined as a defendant in a state proceeding, it cannot remove the entire general adjudication from the state court to the federal court. Moreover, it is probable, indeed likely, that the Senate Committee deemed the removal provision unnecessary in view of 28 U.S.C. 1441(a), which permits removal of "any civil action brought in a State court of which the district courts * * * have original jurisdiction." [24] When Congress intends to foreclose the right of removal to the United States and its instrumentalities, it does so in express language. See, *e.g.*, 28 U.S.C. 1445 (a) and (b); 46 U.S.C. 688; 12 U.S.C 1138; 15 U.S.C. 77v. It

courts of appeals. The proposed rule of conformity would not apply to Indian water rights or when state law conflicts with accomplishment of federal programs. Final Report of the National Water Commission 462—463 (1973).

If the McCarran Amendment already required conformity with state procedures, thus barring suits in federal court, the conformity proposals in the Commission's report, and in the legislation described by Professor Morreale, would have been unnecessary.

[24] Whether this provision permits removal of a water adjudications suit against the United States under the McCarran Amendment is presently being litigated. One district court has held that such suits are not removable because they are not within the federal courts' original jurisdiction. *In re Green River Drainage Area*, 147 F. Supp. 127 (D. Utah). The contrary view is that all suits against the United States arise under federal law. 1A Moore's *Federal Practice*, pp. 359–360, n. 6 (2d ed. 1974); American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 260 (1969); *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 610 (concurring opinion of Justices Rutledge and Murphy).

has not done so here, and it has not taken the further drastic step of barring the United States from initiating water suits in federal courts. Had it intended the latter result, there can be little doubt that it would have expressly so provided in the McCarran Amendment. It would have been equally explicit if it had intended, as petitioners claim (Br. 34–35), to authorize defendants in federal court water rights suits brought by the United States to remove them to state court simply by naming the United States a defendant in the state proceeding, after they were served with the federal complaint.

C. NO BASIS EXISTS FOR INFERRING A REPEAL BY IMPLICATION

Petitioners concede (Br. 29–30) that the United States may continue to sue as a plaintiff or intervenor in state courts. Their further argument that the McCarran Amendment was intended to require the federal government to assert its water rights exclusively in state courts is essentially a contention that 28 U.S.C. 1345 was repealed by implication. There is nothing to support this contention.

It is a cardinal rule that repeals by implications are not favored, and that only when there is an irreconcilable conflict between an earlier and later statute will the Court conclude that Congress intended such a result. *Gordon* v. *New York Stock Exchange*, No. 74–304, decided June 26, 1975 (slip op., pp. 22–23); *Morton* v. *Mancari*, 417 U.S. 535, 549–551. Indeed, "[w]hen there are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by a mere implication

flowing from subsequent legislation." *Rosencrans* v. *United States*, 165 U.S. 257, 262.

As we have discussed above, no intent to repeal 28 U.S.C. 1345 can be found either in the language of the McCarran Amendment or in its legislative history. Nor does an irreconcilable conflict exist between the two statutes. The only conflict to which petitioners allude is between the Colorado Water Right Determination and Administration Act of 1969 (Colorado Revised Statutes, 1973, Title 37, Article 92) and Section 1345 of the Judicial Code (Br. 31–34). But if a repeal by implication is to be found, it must be based upon conflicts between two federal laws, not upon inconsistencies between federal law and state law. The McCarran Amendment applies, literally, to any suit for the adjudication of water rights, in all fifty States. State water laws vary widely, see National Water Commission, *Summary-Digest, supra,* n. 11, and the extent of repeal of 28 U.S.C. 1345 surely cannot depend on the adequacy of varying state procedures for a determination of water rights.

Moreover, petitioners' contentions would result in the repeal by implication not of one major jurisdictional grant, but of two. Quite apart from the right of the United States to invoke the historic jurisdiction defined by 28 U.S.C. 1345, the water rights claims asserted by it in this case fit comfortably within the general federal question jurisdiction conferred on the district courts by 28 U.S.C. 1331(a). Yet, according to petitioners' analysis, the McCarran Amendment would also have to be deemed to have impliedly repealed Section 1331(a) as well as Section

1345, although there is no conflict and not the slightest indication that Congress intended such a drastic change in the jurisdiction of the federal courts.[25]

II

THE DOCTRINES OF ABSTENTION AND COMITY ARE INAPPLICABLE IN THIS CASE AND THUS CANNOT BE INVOKED SO THAT THE FEDERAL COURT MAY AVOID DECIDING THE FEDERAL QUESTIONS PRESENTED BY THE UNITED STATES

1. Even a cursory review of the complaint in this case (Pet. App. 21a–40a) demonstrates that the principal claims before the district court involve questions of federal law under the reserved rights doctrine. See *United States* v. *District Court for Eagle County, supra,* 401 U.S. at 526. Although these federal questions are not dependent on state law, petitioners nevertheless assert that the United States should be forced to present and litigate these issues in the state proceeding because, *after* the United States filed its federal complaint, one of the defendants to the federal action responded by joining the United States as a party to the monthly proceedings in Water Division No. 7 (see pp. 7–8, *supra*). The contention that in these

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[25] Petitioners' argument is particularly anomalous in light of the fact that they apparently would continue the federal courts' jurisdiction under Section 1331(a) over suits *against* the United States for the determination of water rights held by the United States. One of the *amici curiae*, the State of New Mexico, indeed, has brought a number of such suits, (listed at p. 9 of our Brief in Opposition). Thus, petitioners would leave the federal courts open for the determination of Indian and federal government water rights to everyone except the United States.

circumstances the federal courts should abstain, thereby depriving the United States of its choice of a federal forum and conferring upon petitioners what is in effect a right of removal, is extraordinary; it gains no support from the decisions of this Court concerning the abstention doctrine or principles of comity; and the court of appeals properly rejected it.

While the Court has frequently divided over whether a particular case presented an appropriate occasion for abstention,[26] the doctrine has generally been confined to cases, such as *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, in which state law may affect the disposition of a constitutional question and the state law is so uncertain that an immediate federal decision would not be appropriate, see *Harris County Commissioners Court* v. *Moore*, 420 U.S. 77. Indeed, in *Wisconsin* v. *Constantineau*, 400 U.S. 433, 438 (and *Reetz* v. *Bozanich*, 397 U.S. 82, 86), the Court held that "the abstention rule *only* applies where 'the issue of state law is uncertain.' *Harman* v. *Forssenius*, 380 U.S. 528, 534" (emphasis added).

No such state issues are presented in this case. The major claims involved are federal and are not dependent upon state law. To the extent that federal law incorporates state law as the rule of decision for other claims alleged in the complaint (compare Section 8 of the Reclamation Act of June 17, 1902, 32 Stat. 390, 43 U.S.C. 383, with complaint, para. X (Pet. App. 34a)),

[26] See, *e.g.*, *Burford* v. *Sun Oil Co.*, 319 U.S. 315; *Louisiana Power and Light Co.* v. *City of Thibodaux*, 360 U.S. 25; *Allegheny County* v. *Frank Mashuda Co.*, 360 U.S. 185.

there is no uncertainty in the basic state law[27]—and petitioners do not argue otherwise.[28]

Moreover, the abstention doctrine, which relieves the federal courts of their duty to decide cases within their jurisdiction, has been confined to "narrowly limited 'special circumstances.'"[29] The general rule is that "[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction * * *. The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 40, quoted with approval in *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415.[30] Otherwise the basic purpose of the grants of original jurisdiction to federal courts—to provide a neutral forum staffed by independent judges who, free from

[27] Even when the constitutionality of the state law is dependent upon the construction of that law, the Court has held abstention to be inappropriate if the meaning of the state law was not unsettled or uncertain (*Chicago* v. *Atchison, T. & S. F. Ry.*, 357 U.S. 77; *Doud* v. *Hodge*, 350 U.S. 485, 487; *Toomer* v. *Witsell*, 334 U.S. 385), or if resolution of unsettled state law would not avoid the constitutional issue (*Baggett* v. *Bullitt*, 377 U.S. 360, 375–378).

[28] Even if there were uncertainty, the Court has held that "[w]here a case involves a nonconstitutional federal issue, however, the necessity for deciding which depends upon the decision on an underlying issue of state law, the practice in federal courts has been, when necessary, to decide both issues." *Propper* v. *Clark*, 337 U.S. 472, 490.

[29] *Zwickler* v. *Koota*, 389 U.S. 241, 248, quoting *Propper* v. *Clark*, 337 U.S. 472, 492; *Harris County Commissioners Court* v. *Moore*, *supra*, 420 U.S. at 83.

[30] See also *Cohens* v. *Virginia*, 6 Wheat. 264, 403–404 (Marshall, C. J.); cf. *Zwickler* v. *Koota*, *supra*, 389 U.S. at 248.

local prejudice, can decide cases raising federal questions, suits by and against the United States, and diversity cases—would be defeated.

When, as here, the federal suit not only involves federal questions but also has been brought by the United States, the constraints on the federal courts to decide the case rather than defer to the state court are even stronger. At a minimum, federal courts should be—and throughout this nation's history, have been—open to adjudicate suits brought by the sovereign to enforce its laws or determine its civil claims.[31] Indeed, the right of the United States to sue in its own courts is considered to be of such paramount importance that the American Law Institute has recommended that abstention not be permitted in actions brought by the federal government, even when there are underlying issues of unsettled state law. American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 50, 298 (1969).

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[31] See Friendly, *Federal Jurisdiction: A General View* 8–9 (1973). In describing a minimum model of federal jurisdiction, Judge Friendly ranks suits by the United States as having the highest priority. He there quotes (*id.* at 9) the following statement from Frankfurter & Landis, *The Business of the Supreme Court* 10 (1928):

"When the Constitution enabled the central government to secure ways and means for its subsistence by going directly against the individual citizen instead of depending on the largess of the states, it was inevitable that power should be written into the Constitution whereby the Federal Government could fashion its own judicial machinery for enforcing its own claims and safeguarding its agents against the obstructions and prejudices of local authorities."

Thus, in cases within the district court's jurisdiction over suits by the United States or its officers (28 U.S.C. 1345), the court will decide both questions of state and federal law. In *Markham* v. *Allen,* 326 U.S. 490, for example, this Court held that a district court, called upon in a suit by the federal Alien Property Custodian to decide a question of state probate law, properly exercised its discretion in declining to remit the government to state probate proceedings. In *Propper* v. *Clark,* 337 U.S. 472, the Court followed the same course in another suit by the Alien Property Custodian involving a question of state law that had not been definitively resolved by the New York courts.

Leiter Minerals, Inc. v. *United States,* 352 U.S. 220, the only decision requiring what might be characterized as limited abstention in a suit brought by the United States, involved quite unusual circumstances. The government sued in federal court to protect its lessee's possession of certain land in Louisiana, and to quiet its title to the underlying minerals. The defendant had previously filed a possessory action in the Louisiana state courts. Holding that the government suit was essentially defensive, and that the United States should be permitted to choose its forum (352 U.S. at 228), the Court sustained an injunction against the state possessory suit. In addition, however, the Court noted the government's claim that the applicable Louisiana statute, if construed adversely to the government, would be unconstitutional as an impairment of the obligation of contracts. In view of this constitutional issue and uncertainty surrounding construction and application of the Louisiana law, the Court

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modified the injunction against the state suit to permit a definitive interpretation of the state statue in the state court. The federal court, of course, nevertheless retained jurisdiction over the action by the United States.

No question of the constitutionality of the state's laws analogous to *Leiter Minerals* is presented here. Moreover, unlike *Leiter Minerals,* petitioners here do not seek to have the state courts initially pass on unclear questions of state law (there are none), leaving the final decision with the federal court;[32] petitioners instead seek to oust federal jurisdiction over the United States' suit altogether.

Petitioners also rely upon *Burford* v. *Sun Oil Co.,* 319 U.S. 315, which they describe as "particularly analogous to the circumstances of this case" (Br. 11). In fact, *Burford* is wholly inapposite. The federal suit there was by a private party challenging an order of a state administrative agency on grounds of state law and federal due process (*id.* at 317). The Court's decision to require abstention [33] rested on the basis that "difficult state questions" might be involved (*id.* at 331) and on the principle that review of orders of state administrative agencies deciding state law issues, in the first instance, ought to be in the state courts in order to avoid "federal-state conflict" (*id.* at 332–

[32] Even in *Leiter Minerals* (352 U.S. at 229–230), the Court cautioned that: "It need hardly be added that the state courts in such a proceeding can decide definitively only questions of state law that are not subject to overriding federal law."

[33] Mr. Justice Frankfurter, joined by three other Justices, dissented, in part, on the ground that the controlling state law was not uncertain (*id.* at 339–342).

334).[34] In the instant case, of course, the bulk of the complaint consists of purely federal claims; other claims do not involve unsettled questions of state law; and we are not concerned here with federal review of the order of a state administrative agency deciding state law questions.

In the light of the foregoing, it is difficult to understand petitioners' insistence that the abstention doctrine applies. That contention cannot be sustained on the basis of the McCarran Amendment because it was not intended to affect the affirmative jurisdiction of the federal courts over water suits by the United States.

Petitioners have attempted to support their abstention argument by relying upon cases involving natural resources. *E.g., Pacific Live Stock Co.* v. *Oregon Water Bd.,* 241 U.S. 440 (water); *Kaiser Steel Corp.* v. *W. S. Ranch Co.,* 391 U.S. 593 (*per curiam*) (water);

[34] *Alabama Public Service Commission* v. *Southern Ry. Co.,* 341 U.S. 341, which petitioners also cite (Br. 22), similarly rested on the ground that the federal court in the circumstances of that case should not pass on plaintiff's Fourteenth Amendment Due Process and state law challenge to the order of a state administrative agency; rather, in order to avoid needless friction between the state and federal government, the plaintiff should seek review in the state court (*id.* at 350).

Mr. Justice Frankfurter, joined by Mr. Justice Jackson, concurred on other grounds, but added that (*id.* at 361):

"The only reason for declining to entertain the suit is that it may well be more desirable as a matter of State-Federal relations for the order of a State agency to be reviewed originally in the State lower court and not to be challenged in the first instance in a federal court. It is not for me to quarrel with the wisdom of such a policy. But Congress, in the constitutional exercise of its power to define the jurisdiction of the inferior federal courts, has decided otherwise."

Burford v. *Sun Oil Co., supra* (oil); *Reetz v. Bozanich, supra* (fishing). But the mere involvement of natural resources is not a basis for abstention. We have already discussed the *Burford* case and the grounds for decision there; as to *Kaiser Steel Corp.* and *Reetz,* both decisions rested on the fact that controlling questions of "novel" (*Kaiser Steel, supra,* 391 U.S. at 594) or "uncertain" (*Reetz, supra,* 397 U.S. at 87) state law were presented.

Pacific Live Stock, on the other hand, did not even involve abstention. The Court sustained the constitutionality of Oregon's water law under the Fourteenth Amendment. It held in addition that an attempt to remove the state's administrative water proceeding to federal court provided no basis for an injunction to protect the federal court's jurisdiction, because that court had remanded the case to the state agency. The Court further held that plaintiff's pending diversity actions were private suits to prevent encroachment upon the plaintiff's water rights, and thus completely different from the quasi-public proceeding under state law that the plaintiff sought to enjoin. 241 U.S. at 447.

Far from supporting petitioners' abstention argument, *Pacific Live Stock* indicates that "where the same matter is brought before courts of concurrent jurisdiction, the one first obtaining jurisdiction will retain it until the controversy is determined, to the entire exclusion of the other, * * *." 241 U.S. at 447. This is, as the court of appeals held in this case (Pet. App. 12a), the usual rule when jurisdiction over a *res* is

concerned. *Princess Lida* v. *Thompson,* 305 U.S. 456, 466; *Penn General Casualty Co.* v. *Pennsylvania,* 294 U.S. 189, 195. On the other hand, "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." *Princess Lida* v. *Thompson, supra,* 305 U.S. at 466. Petitioners (Br. 32) apparently view Colorado's water proceedings in Division No. 7 as *in rem* or *quasi in rem,* since they permit service by publication. But however characterized, the state proceeding provides no basis for abstention under the test of *Pacific Live Stock* and *Princess Lida.*[35]

2. *Younger* v. *Harris,* 401 U.S. 37, and the line of decisions following it, some of which petitioners cite (Br. 17–21), have no bearing on the question here. Those cases generally involved federal suits by private plaintiffs for injunctive or declaratory relief against state criminal statutes that allegedly deprived them of

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[35] Petitioners also rely (Br. 12) upon *Allegheny Airlines* v. *Pennsylvania Public Utility Commission,* 465 F.2d 237 (C.A. 3). In that case, the court held that a declaratory judgment complaint, alleging that a carrier was exempt from state regulation because its activities were in interstate commerce, was properly dismissed by a federal court because the plaintiff was simply seeking a determination, in advance of the state proceeding, of the carrier's federal defense. Cf. *Public Service Commission* v. *Wycoff Co.,* 344 U.S. 237. Here the government is asserting affirmative federal claims. Contrast *Gay* v. *Board of Registration Commissioners,* 466 F.2d 879 (C.A. 6), holding that when state law is not controlling, will not contribute to avoidance of a federal constitutional question, and is not entangled in a skein of state regulations, abstention is inappropriate.

their First Amendment rights [36] or, in one instance, a state civil proceeding closely "akin to a criminal prosecution" that allegedly had the same effect. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 604.[37]

The cases—whether deciding in favor of or against federal relief—rest in large measure upon "the fundamental policy against federal interference with state criminal prosecutions" (*Younger* v. *Harris, supra,* 401 U.S. at 46)—a principle of comity that obviously is irrelevant to this case. Moreover, regardless whether this Court subsequently decides to extend *Younger* generally to federal suits involving state civil statutes, the basic problem involved in all of these cases is the possible adverse effect on federal-state relations caused by depriving state courts of the first opportunity to pass upon the constitutionality of the laws of their own state [38]—again, an obviously irrelevant consideration in this case, quite aside from the important difference that here it is the United States that has sued in its own court. Petitioners' only point thus might be that because the state courts are available, the choice of a federal forum by the United States aggravates federal-

[36] *Samuels* v. *Mackell*, 401 U.S. 66; *Boyle* v. *Landry*, 401 U.S. 77; *Perez* v. *Ledesma*, 401 U.S. 82; *Dyson* v. *Stein*, 401 U.S. 200; *Byrne* v. *Karalexis*, 401 U.S. 216; *Mitchum* v. *Foster*, 407 U.S. 225; *Steffel* v. *Thompson*, 415 U.S. 452; *Ellis* v. *Dyson*, No. 73–130, decided May 19, 1975; *Hicks* v. *Miranda*, No. 74–156, decided June 24, 1975; *Doran* v. *Salem Inn, Inc.*, No. 74–337, decided June 30, 1975.

[37] In *Huffman*, the Court further pointed out, as a reason for deferring to the state court, that "the constitutional issue [in the case] involves a [state] statute which is capable of judicial narrowing." 420 U.S. at 609.

[38] See also n. 37, *supra*.

state relations and, therefore, should not be respected by the federal courts. There is nothing to support such an assertion, which in any event is contrary to our federal system and its history over the past two centuries. It is, in short, petitioners' position—not the United States'—that would alter the traditional federal system of government by barring the United States from access to its own courts.

III

DETERMINATION OF INDIAN AND FEDERAL WATER CLAIMS IN FEDERAL COURT WILL NOT INTERFERE WITH STATE PROCEEDINGS

A. IMPORTANT PRACTICAL BENEFITS RESULT FROM WATER RIGHTS SUITS BY THE UNITED STATES IN FEDERAL COURTS

As we have discussed above, an affirmative suit by the United States in federal court for a determination of Indian and federal government water rights serves the basic purpose of the Amendment: to expose such claims to adjudication unsheltered by sovereign immunity. Such suits also have significant practical advantages over joinder of the United States as a defendant in state proceedings.

First, the federal suit can result in a complete determination, including Indian rights, which can then be incorporated in the final state tabulation of all decreed rights. The federal courts have jurisdiction to determine Indian water rights when put in issue by the United States as trustee under 28 U.S.C. 1345 (and 1331). Cf. *Heckman* v. *United States,* 224 U.S.

413; *United States* v. *Board of Commissioners of Osage County,* 251 U.S. 128. On the other hand, it appears that state courts have not been granted jurisdiction over Indian water rights in the McCarran Amendment or in other statutes permitting state civil jurisdiction over Indians (see discussion, *infra,* pp. 52–62).

Second, injection into state water proceedings of the difficult questions of federal law surrounding determination of federal reserved rights confronts the state tribunal with questions alien to the usual priority questions presented in state water adjudications. The federal courts are expert in such issues.

The typical rule in the western states dates priority from actual diversion or application and makes rights granted currently junior to rights applied for or decreed in previous years. *Summary-Digest, supra,* n. 11, at Part I, p. 32. Such state rules are inapplicable to Indian and most federal reservations and lands whose water rights are controlled by the federal reserved rights doctrine.

The federal principle dates priority from the creation of the federal reservation. *Winters* v. *United States, supra; Arizona* v. *California, supra.* Many of these reservations were set aside more than fifty years ago. State judges ordinarily determine relatively narrow state law questions such as when the water was actually applied to a beneficial use, the extent of its use (*e.g.,* acres irrigated), and the amount of water needed. When confronted with federal claims, however, the state water judges must determine the purpose of the federal reservation, the relationship of the

water claimed to that purpose, and the quantity of water needed for future uses within that purpose. To do this they must consider Indian treaties, Acts of Congress, and presidential and departmental orders under various statutory delegations, which were adopted long ago, and with which state courts are generally unfamiliar. The federal issues must, therefore, by their very nature be considered separately from the typicaly simpler state law issues which control private appropriations of water. Federal courts, on the other hand, particularly in the west, are expert in dealing with matters relating to federal reservations, because they are the principal tribunals for conduct of federal land, reclamation, and Indian litigation. They are thus ideal forums in which to conduct such proceedings.

Third, affirmative suits in the district courts assure a federal forum for appellate review of federal law issues in the courts of appeals, rather than in this Court. If the state tribunals alone decide the federal questions raised here, this Court will be the sole federal tribunal to which the parties can bring their claims of error to resolve those questions. See *Eagle County, supra,* 401 U.S. at 526. The burden on this Court would be substantially minimized by proceedings originating in the federal district court. Indeed, the availability of that jurisdiction was a significant factor in this Court's decision to dismiss the original suit in the Pyramid Lake case (*United States* v. *Nevada,* 412 U.S. 534) with the express suggestion that the United States assert its claims in the federal district court.

Fourth, Indian and government rights decreed in federal courts can be integrated into state general adjudications as easily as rights previously decreed in state tribunals. This can be conveniently demonstrated in the specific context of Colorado's water law, although we believe the principle to be applicable throughout the nation.

B. FEDERAL DECREES CAN EASILY BE INTEGRATED INTO COLORADO'S GENERAL ADJUDICATION

Until recently, water rights in Colorado were adjudicated in seventy separate "water districts," which, for the most part, did not encompass entire watersheds.[39]

In 1969, Colorado adopted its "Water Right Determination and Administration Act," consolidating the seventy districts into seven "water divisions," the boundaries of which largely correspond to the State's major watersheds. Colo. Rev. Stat. 37-92-201 (1973). See Greer, *A Review of Recent Activity in Colorado Water Law,* 47 Den. L.J. 181 (1970).

Colorado's 1969 Act provides for two types of pro-

[39] See Colo. Rev. Stat. 148-9-1—148-9-21, 148-13-1—148-13-70 (1963 [repealed]); see also *O'Neil* v. *North'n Colorado Irrigation Co.*, 242 U.S. 20; *Ft. Lyon Canal Co.* v. *Arkansas Valley Sugar Beet Co.*, 39 Col. 332, 90 Pac. 1023. Colorado is one of only three western states in which a permit is not required to appropriate water from surface sources. *Summary-Digest, supra* n. 11, at Part I, p. 14. Under the former Colorado law, water rights were determined in each district first in an "original" adjudication and then in periodic "supplemental" adjudications designed to add all rights established since the original decree. See Colo. Rev. Stat. 148-9-3—148-9-7 (1963 [repealed]). See 2 Hutchins, *Water Rights Laws in the Nineteen Western States*, 470 (1974) for a comprehensive discussion of the development of Colorado water law.

ceedings: applications for confirmation of individual rights, and the tabulation and general adjudication of all previously decreed water rights. The first type of proceeding "makes each water court an administrative agency with complete records of and supervision over newly initiated and incomplete water rights." Trelease, *Water Law* 138 (2d ed. 1974). It requires an application, notice by mail and publication of monthly lists of applications filed, an opportunity for interested persons to protest before water referees and the division water judge, and a decree defining the applicant's water right in terms of amount and priority. Colo. Rev. Stat. 37-92-301—37-92-306 (1973). One extremely important limitation is that priorities for all rights awarded under the Act during the current year are junior to rights applied for in previous years or decreed prior to June 7, 1969. Colo. Rev. Stat. 37-92-306 (1973).

The second type of proceeding completes the process of general adjudication by providing for the integration of all individual decrees into judicially confirmed tabulations for each water source and for the entire Division. Each Division Water Engineer is to prepare such tabulations and file them in the water court. After notice and opportunity for protest, the tabulations will be confirmed by judicial decree. Under recently enacted legislation, hearings on the completed tabulations are to begin in the fall of 1982. Colo. Rev. Stat. 37-92-401—37-92-402 (1973), as amended by the Act of July 1, 1975.

The process of tabulation has been under way for

some time. It has required the integration of water rights decrees entered in each of the separate districts from which the division was formed. See, Colo. Rev. Stat. 37-92-401(1)(b) (1973); Greer, *supra*, 47 Den. L.J. at 184.[40] In Water Division No. 7, for instance, decrees from eight separate state water districts were listed and a past federal decree determining water rights has been incorporated in the same manner.

The decree in *United States* v. *Morrison Consolidated Ditch Co.* (D. Colo., Equity No. 7736, decided October 25, 1930), adjudicated the water rights of a portion of the Southern Ute Reservation on the Pine (Los Pinos) River, a tributary of the San Juan. Under the decree, thirteen Indian ditches with a priority date of July 25, 1868, have been incorporated into the revised priority list for Water Division No. 7.[41]

No new adjudication was required to establish either the state decrees from the old water districts, or the past federal decrees. The results of the present federal proceeding can as easily be incorporated into the tabulations of rights on the various streams in

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[40] There have commonly been a number of adjudications over time within each district—an "original" adjudication and periodic "supplemental" adjudications designed to add all rights initiated since the original decree. Colo. Rev. Stat. 148-9-3—148-9-7 (1963 [repealed]). Hutchins, *supra* n. 39, at 474–475. Former districts numbered 29–34, 46, and 69 were consolidated into Division No. 7. Compare former Colo. Rev. Stat. 148-13-30—148-13-35, 148-13-69 (1963) with current Colo. Rev. Stat. 37-92-201(1)(g).

[41] We have included as an exhibit to this brief a copy of the explanatory cover page, and the priority list for the Los Pinos River in Water Division No. 7 on which the rights established in the *Morrison Ditch* case appear as "basin rank" number 1.

Division No. 7. In effect, the federal proceeding isolates the claims of the United States and provides for their determination by the federal court separately from the monthly lists of new applications in the state courts, subject, however, to integration into the general adjudication of tabulations scheduled for 1982.

Petitioners argue that this procedure would result in "a piecemeal solution of a larger problem" (Br. 31) and would mean "duplicative proceedings in two courts presiding simultaneously over one resource" (Br. 9).

These contentions ignore the differences among (1) the determination of the government's claim to water rights previously vested under federal law, (2) Colorado's procedure for adjudication of new applications for individual water rights under the State appropriation doctrine, and (3) the State's procedure for integrating in a general adjudication the tabulated rights of all water users, however and wherever those rights were previously decreed.

The fact that two courts will simultaneously be considering water rights questions in the same watershed is not, in itself, a cause for concern, because they will be determining different questions. The federal court will be deciding the Indian and federal claims under federal law. The state court will continue the month-to-month determination of new applications under the 1969 Act. The two proceedings will merge in the final tabulation of decreed rights.

Indeed, for the reasons explained above (pp. 44–45, *supra*), if the federal issues were presented in the state proceeding, its character would be drastically

changed, and it would be necessary for the state court to separate those issues from the customary month-by-month proceeding. The holders of decreed rights in Water Division No. 7 ordinarily do not become parties to the on-going proceeding because, under the State's law, priority in current proceedings is junior to decrees and applications filed in prior years. However, injection of the United States' claims into the case would require that they appear if they wish to challenge the government's claims. In effect, the state court itself must conduct separate proceedings.

Conduct of the separate proceeding in the federal court is not incompatible with the policy of the McCarran Amendment. It is desirable, of course, that administration of any watershed be unified. In times of water shortage, it is efficient for a single authority to have the power to enforce priorities and see that senior rights are respected. But most watersheds are interstate—as is the San Juan—and beyond complete administration by the States except by compact.

Within the States, there is no procedural reason why all water rights must be decreed in the same judicial proceeding, so long as all decrees are ultimately integrated. Otherwise, administration of Colorado watersheds would be impossible, since, as we have noted, rights in its watersheds have been decreed in numerous separate proceedings, including federal proceedings.

Sound procedure for adjudication of claims by any single person or entity may require that notice be given other users so that if adversely affected they may appear and challenge the rights being asserted. See *O'Neil* v. *North'n Colorado Irrigation Co.*, 242 U.S.

20. Thus, in its federal suit, the government has sought to join all using the waters of the streams listed in its complaint.

It should not be necessary for private water users whose rights have already been established in previous adjudications to relitigate those rights in federal suit. It is true that their rights are not strictly *res judicata* as to the United States, because the government has generally not been a party to the adjudications in which they were established. Cf. *Gutierres* v. *Albuquerque Land Co.*, 188 U.S. 545, 556–557. However, the United States recognizes these water rights decrees as *prima facie* evidence of the rights they set forth, and they would only be challenged if the government held a junior priority to them, and investigation revealed some serious discrepancy between the listed rights and the actual water use they represent.[42] In such a case (which we would anticipate to be rare), the factual hearings could certainly be held locally by a special master.

Finally, there is no reason to expect duplication in the actual administration of the watershed. The United States' complaint asks the appointment of a water master to enforce the court's decree on a continuing basis. If such relief is granted, the master would merely monitor the state administrative system

[42] The United States would have the right to challenge these prior decrees (and possibly require that they be relitigated) even if it were a party to the *state* court adjudication, for, absent notice, the essential prerequisities for *res judicata* against the government would be lacking. The federal proceeding thus poses no greater potential burden on the individual water users than does the state proceeding.

to ensure compliance with the rights recognized by the district court.

The only arguably serious "practical" objection raised by petitioners in this connection is the fact that the federal district court for Colorado is located in Denver, "some 300 miles distant" (Pet. Br. 5) from Water Division No. 7. But any burdens on petitioners resulting from the district court's location could be minimized by appointment of a special master (as is common in water rights cases) to hold local hearings on the necessary factual determinations, to the extent that parties opposing the government's claims wish to present evidence After such hearings, when the Indian and government rights are finally decreed under federal law, they can be integrated into the tabulations in Water Division No. 7 in terms of priority dates and quantity, in the same way as the rights of nonfederal water users decreed under state law.[43]

IV

FEDERAL COURTS ALONE HAVE JURISDICTION OVER CLAIMS FOR DETERMINATION OF INDIAN WATER RIGHTS

A glance at the map enclosed shows that a substantial part of Colorado Water Division No. 7 consists of the Ute Mountain Ute and the Southern Ute Reservations. The reserved water rights asserted by

[43] While we anticipate that the district court's decree will recognize that the two Indian tribes are entitled to water rights of a specified quantity, the United States has always taken the position that those rights may be modified in subsequent proceedings should the needs of the tribes increase. See *Conrad Inv. Co.* v. *United States*, 161 Fed. 829, 835 (C.C.A. 9).

the United States as trustee for those tribes are the first claims listed in the complaint. The presence of these Indian claims to reserved rights in the waters of the San Juan and its tributaries distinguishes this suit from proceedings in other Colorado Water Divisions in which the United States has asserted federal claims for non-Indian reserved and appropriative water rights. Because of the Indian claims, we believe the suit *must* be brought in federal court.

However, whether the McCarran Amendment waives immunity to the extent of permitting state court jurisdiction over the reserved water rights of Indians need not be decided, unless the Court rejects the contentions we have made above, and concludes that the federal courts do not have jurisdiction over non-Indian water claims asserted by the United States; or that even if they do, that the doctrines of abstention and comity require that such claims be remitted to the state courts.

The argument that Indian water rights are subject to the McCarran Amendment can be simply stated. In *Eagle County,* this Court held that all water rights of which "the United States is the owner" (43 U.S.C. 666(a))—appropriative, riparian and reserved—fall within the Amendment's all-inclusive waiver of immunity, which contains no exceptions. 401 U.S. at 524. As trustee for the Indian tribes, the argument would continue, the United States "owns" their water rights for their beneficial use. Therefore, all Indian rights for which the United States is trustee are included.

We submit that the argument is unsound. It ignores the unique legal status of Indian property and juris-

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dictional rights, as defined in this Court's decisions; it overlooks the express language of 25 U.S.C. 1322(b) and 28 U.S.C. 1360(b) denying state court jurisdiction to adjudicate Indian water rights for which the United States is trustee; and it disregards the crucial fact that the relationship between the McCarran Amendment and those rights was not an issue in *Eagle County*.

This Court has recognized that "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789. Congress has traditionally permitted state criminal and civil jurisdiction in Indian country only after the most comprehensive and detailed scrutiny and only by a clearly defined grant of jurisdiction. See, *e.g.*, *Kennerly* v. *District Court of Montana*, 400 U.S. 423, 424, n. 1, 427; *Williams* v. *Lee*, 358 U.S. 217, 218–221; *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 168, 172; *United States* v. *Mazurie*, 419 U.S. 544, 556–559.

Indians continue to be recognized as a distinct and separate people[44] (*McClanahan* v. *Arizona State Tax Commission, supra; United States* v. *Mazurie, supra*), whose rights and property on their reservations are the primary responsibility of the federal government under its duty to protect them as its wards. Cf. *Morton* v. *Mancari*, 417 U.S. 535, 551–553.

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[44] In the Indian Appropriation Act of March 3, 1871, 16 Stat. 566, 25 U.S.C. 71, Congress barred dealings with Indian tribes as independent nations. See *Antoine* v. *Washington*, 420 U.S. 194, 201–204. See also *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148.

The Court explained the derivation of these rules in *United States* v. *Kagama*, 118 U.S. 375, 383–384:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen. [Emphasis in original.]

Out of this obligation to protect the Indians has arisen the general rule that the state courts have no jurisdiction over Indian property rights on the reservation unless it is expressly conferred by Congress. Cf. *Minnesota* v. *United States*, 305 U.S. 282, 389–390; *McClanahan* v. *Arizona State Tax Commission, supra*. For "[o]nce the United States was organized and the Constitution adopted * * * tribal rights to Indian lands became the exclusive province of the federal law." *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 667. Among these property rights, water rights are indispensable since without them the land set aside in Indian reservations might be

useless. *Winters* v. *United States,* 207 U.S. 564; *Arizona* v. *California,* 373 U.S. 546, 595–601; *United States* v. *Powers,* 305 U.S. 527.[45] Thus, absent an explicit grant by Congress of jurisdiction to the States to determine Indian water rights in their courts, the States are without jurisdiction over this subject matter.

Indian water rights, whether expressly defined in agreements creating reservations, or implied under the *Winters* doctrine, are unlike other water rights held by the United States. As recognized in *Arizona* v. *California, supra,* 373 U.S. at 601, the principles of the reserved rights doctrine are the same whether Indian or non-Indian federal claims are involved (see n. 50, *infra,* p. 62). But even when the United States is trustee for the Indians, the water rights belong to them, not to the federal government. The government's "ownership" status as trustee is simply an incident of the special obligation to protect the Indians, which the United States assumed when it occupied their ancestral lands. Cf. *Morton* v. *Mancari, supra.* In the words of the Final Report of the National Water Commission (n. 23, p. 29, *supra*) at 477:

> Indian water rights are different from Federal reserved rights for such lands as national parks and national forests, in that the United States is not the owner of the Indian rights but is a trustee for the benefit of the Indians. While the United States may sell, lease, quit claim, release, or otherwise convey its own

[45] See also *United States* v. *Ahtanum Irrigation District,* 236 F. 2d (C.A. 9); *United States* v. *Walker River Irr. Dist.,* 104 F. 2d 334 (C.A. 9).

> Federal reserved water rights, its powers and duties regarding Indian water rights are constrained by its fiduciary duty to the Indian tribes who are beneficiaries of the trust.

The fiduciary considerations to which the Commission refers constrain Congress, as much as they do other branches of the United States Government. Thus, it has long been a general principle of construction that congressional intention to affect Indian property rights must be clearly expressed, and that any ambiguity is to be resolved in favor of the Indians. See, *e.g., Antoine* v. *Washington,* 420 U.S. 194, 199–200; *Winters* v. *United States, supra; Choate* v. *Trapp,* 224 U.S. 665, 675. A statute that subjects Indian tribes to defense of their property rights in the state courts falls clearly within this rule.

This follows because one surviving attribute of Indian sovereignty is exemption from suit absent an express waiver of immunity by Congress. *Turner* v. *United States,* 248 U.S. 354. This has not changed because the United States is trustee for the Indians. It is "as though the immunity which was theirs as sovereigns passed to the United States *for their benefit,* as their tribal properties did." *United States* v. *U.S. Fidelity Co.,* 309 U.S. 506, 512 (emphasis added).

Congress has the power to subject federal property to suit in state or federal courts by waiving the sovereign immunity of the United States. But because of the United States' fiduciary obligations to the Indians, Congress has been more circumspect about waiving immunity which subjects their property to suit in state courts.

For example, in Pub. L. 280, Act of August 15, 1953, 67 Stat. 589, Congress granted civil jurisdiction in Indian country to five named States (not including Colorado), and established an optional procedure by which all other States could acquire such jurisdiction if they wished it. In 1968, Congress declared, Title IV, Pub. L. 90–284, Act of April 11, 1968, 82 Stat. 79, that the optional procedure would apply only "with the consent of the Indian tribe occupying the particular Indian country * * * affected." 25 U.S.C. 1322(a). Colorado has never invoked this procedure and no tribe in Colorado has consented to it.

Of more immediate and controlling significance in this case is the limitation Congress placed upon this consent by expressly excluding from it tribal property, including water rights, held in trust by the United States. 25 U.S.C. 1322(b); 28 U.S.C. 1360 (b).[46] This enactment, one year after the McCarran Amendment and reaffirmed in 1968, forecloses the highly technical contention that because the United States is "owner" of the water rights it holds in trust for the Indians, those rights are included under the McCarran Amendment.

Neither the language nor the history of the Amend-

[46] "(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, *including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States* or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; *or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.*" (Emphasis added.)

ment reflects a purpose to subject Indian rights to suit in the state courts. The Amendment does not refer to Indian water rights. Indeed, they were mentioned only briefly during the hearings on the bill by the Department of Justice witness opposing it (see testimony of William Veeder, Senate Hearings 6–7, 12–13, 18), and in the Department of the Interior's letter cataloguing the various kinds of water rights in which the United States was interested in one capacity or another. Although Interior's letter outlined as an alternative to S. 18 a proposal that would have expressly excluded Indian water rights from the consent to suit under consideration by the Senate (n. 18, pp. 24–25, *supra*), there is no indication in the Senate Report (S. Rep. No. 755, *supra*), or in the remarks by Senator McCarran explaining the bill (97 Cong. Rec. 12947–12948 (1951)), that the legislation involved Indian rights. The Senate Report did not, in its review of the reasons for the legislation, even mention the reserved rights doctrine of *Winters* v. *United States, supra*,[47] as applied to Indian water rights. S. Rep. No. 755, *supra*, at 2–7.

Nor was anything said on the floor of either chamber indicating that Indian water rights were to be included. Apparently recognizing that the record was unclear on this matter, Senator Chavez of New

[47] A brief colloquy in the hearings between Senator Watkins and Mr. Veeder mentioned the role of the United States as trustee for the Indians but this was in connection with the Senator's belief, which Mr. Veeder was contesting, that the United States had conceded the ownership of various streams to the States (Senate Hearings 12–13). The Senator and Mr. Veeder also discussed the role of the United States as trustee under the reclamation laws (Senate Hearings 14–16).

Mexico questioned Senator McCarran following the latter's explanation of S. 18, which had not mentioned Indians. Senator Chavez asked specifically whether Indian water rights for which the United States was trustee were to be included in the catalogue of federal water rights proposed in Section 2 of the reported bill. He did not refer at all to the waiver of immunity in Section 1. Senator McCarran seemed to answer negatively (97 Cong. Rec. 12948 (1951)).[48] We submit that this history does not reflect the detailed and comprehensive scrutiny to which this Court referred in *Kennerly* v. *District Court of Montana, supra,* 400 U.S. at 427.

Finally, no issue concerning the relationship between reserved Indian water rights held by the United

[48] "Mr. CHAVEZ. I am happy the Senator from Nevada has made a statement explaining the purpose of the bill and the reasons for it. I have no objection to the bill. I know what it means to my State. But I should like to ask a question. If the Interior Department is made the repository of water rights, be they in the United States Government or in individual citizens, does that mean that Indian rights will also be integrated?

"Mr. MCCARRAN. No. All that the bill provides is that the Interior Department shall be a repository for the rights that have been acquired and are held by the United States, so that one seeking to determine water rights on a given stream may know what rights, if any, are claimed by the Government.

"Mr. CHAVEZ. Does the Government claim those rights as the Government, or could it act as trustee, let us say, for a tribe of Indians?

"Mr. MCCARRAN. It could act as a trustee, I suppose. But, Mr. President, there is a deeper and more far-reaching purpose. If my time has not expired——

"The PRESIDING OFFICER. The time of the Senator has expired."

States as trustee, and the scope of the McCarran Amendment, was before this Court either in the *Eagle County* case, or its companion suit, *United States* v. *District Court for Water Div. No. 5, supra*.[49] As we have indicated above, that issue is governed by different legal and historical principles than those that apply to the waiver by Congress of immunity with respect to non-Indian federal property, and the relevant considerations were not fully briefed or argued

[49] References in the government's brief in *Eagle County* to *Winters* v. *United States* were in support of its general view of the reserved rights doctrine, which applied to the non-Indian federal water rights involved (*Arizona* v. *California, supra*), and its claim, ultimately rejected, that the McCarran Amendment was limited to rights defined by state law. Brief for the United States, No. 87, O.T. 1970, pp. 6, 9, 10–11. The government specifically noted in its brief in *Water Division No. 5* that Indian rights were not involved. Brief for the United States, No. 812, O.T. 1970, pp. 10–11, n. 3.

After the decisions in the two cases were announced, the Fort Mojave Tribe of Indians moved for leave to file a suggestion of interest, and supporting points and authorities. The Indians argued that the tribe was an indispensable party to the litigation, that this Court lacked jurisdiction, and that the case should therefore be dismissed. Attached to its *Eagle County* brief as an appendix was a report prepared in the Bureau of Indian Affairs by William H. Veeder (who had testified on the McCarran Amendment). Mr. Veeder asserted that the Department of Justice, because of conflicts of interest, had improperly failed to argue that Indian rights are outside the scope of the statute, and that the United States was not a necessary party to the state water adjudications. The motions for leave to file were denied. 402 U.S. 940. Since no case or controversy concerning Indian water rights was before the Court, any discussion of the merits of this question by the Court would have been inappropriate.

in those cases.[50] Neither *Eagle County* nor *Division No. 5,* therefore, bear on the jurisdiction of state courts over Indian water rights held by the United States as trustee.

Although we conclude that the McCarran Amendment did not subject such rights to state jurisdiction, it is, in our view, unnecessary for the Court to reach this question. As we argued above, Congress did not bar the United States from suing in the federal courts to assert Indian and non-Indian federal water rights; and neither the abstention nor the comity doctrines permit the district courts to abstain from exercising their jurisdiction over such suits in favor of an after-filed joinder of the United States in a state water adjudication.

---

[50] Since *Eagle County* held that the McCarran Amendment includes reserved federal rights, and since this Court did not expressly hold that the *Winters* doctrine extends to non-Indian federal establishments until 1963, when *Arizona* v. *California, supra,* was announced, it might be argued that the only reserved rights Congress could have had in mind in 1952 were those reserved to the Indians. The argument fails because the *Winters* case itself held that the government has power to reserve water and exempt it from appropriations under state law. 207 U.S. at 577. See also *United States* v. *Walker River Irr. Dist.*, 104 F. 2d 334, 336 (C.A. 9), holding that a statute or executive order, as well as an Indian treaty, may reflect an intent to reserve water as well as land. Thus, the reserved rights doctrine was not limited to Indian reservations when the McCarran Amendment was passed (see also discussion, *supra,* p. 13).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1975.

APPENDIX

IN THE MATTER OF TABULATION IN ORDER OF SENIORITY OF ALL DECREED WATER RIGHTS AND CONDITIONAL WATER RIGHTS IN THE DRAINAGE BASIN OF THE LOS PINOS RIVER LOCATED IN FORMER WATER DISTRICT NO. 31 AND IN WATER DIVISION NO. 7.

REVISED PRIORITY LIST

Notice is hereby given that pursuant to Section 148-21-28, C.R.S. 1963, as amended, the Division Engineer of Water Division No. 7 has made such revisions as he deems proper to the July 10, 1974 tabulation of absolute and conditional decreed water rights, including omission or modification of water rights which he has determined to have been abandoned in whole or in part.

The revised tabulation does not include water rights decreed under the provisions of Section 148-21-20, C.R.S. 1963, as amended, and may not include certain water rights in those proceedings under Section 148-21-44, C.R.S. 1963, as amended.

The Division Engineer has made separate Revised Priority Lists so that only those water rights which take or will take water from the same source and are in a position to affect one another will be on the same list.

The Revised Priority List will be available after October 10 in the offices of each Division Engineer, Water Commissioner and County Clerk and Recorder for inspection at any time during regular office hours. The Division Engineer will furnish or mail a copy of a Revised Priority List to anyone requesting the list upon payment of a fee of Five Dollars ($5.00).

Any person who wishes to protest the manner in which a water right or conditional water right is listed in the tabulation, including any revisions, or the omission of a water right or conditional water right from such tabulation shall file a written protest with the water clerk and with the division engineer not later than November 30. Such protest shall set forth in detail the facts and legal basis therefor. Service of a copy of the protest or any other document is not necessary for jurisdictional purposes, but the water judge may order service of a copy of the protest or any other document on any person and in any manner which he may deem appropriate. The fee for filing such protest with the water clerk shall be Twenty Dollars ($20.00).

EXPLANATION OF CODES USED IN THE REVISED PRIORITY LIST

Column (1) - This column indicates the type of STRUCTURE and is coded as follows:

D Ditch R Reservoir SE Seeps PL Pipeline PP Power Plant * Two or more
W Well SP Spring M Mine P Surface Pump O Other of the preceding

Column (WD) - The number signifies the former Water District. The following nine exceptions signify portions of the former Water Districts:

71 = District 34 72 = District 42 73 = District 42 74 = District 42 76 = District 48
77 = District 29 78 = District 29 79 = District 65 80 = District 23

Column (PM) - Code of the Principal Meridians required for LOCATION.

S Sixth Principal Meridian U Ute Principal Meridian
N New Mexico Principal Meridian C Costilla Survey

Column (TWN) or (RNG) - An (H) following either a township TWN or range RNG number indicates a half township or range.

Column (160) - The 160 acre quarter section.

Column (40) - The 40 acre quarter-quarter section.

Column (10) - The 10 acre quarter-quarter-quarter section.

Column (2) - The type of USE is coded as follows:

I Irrigation C Commercial R Recreation F Fire S Stock
M Municipal N Industrial P Fishery D Domestic O Other *** Combination of four or more or the previous

Column (Amount) - The units are coded: CFS Cubic feet per second
AF Acre feet

Column (3) - This column contains a code describing the TYPE OF ADJUDICATION

O Original TF Transfer From
S Supplemental TT Transfer To
C Conditional AP Alternate Point
CA Conditional to Absolute AB Abandonment

Dated this 1st day of October, 1974

Wayne H. Crosby, Division Engineer

C. J. Kuiper, State Engineer

BEST COPY AVAILABLE

OCTOBER 10, 1974

DIVISION 7 . LOS PINOS

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NAME OF STRUCTURE	TYP (1)	NAME OF SOURCE	LOCATION WD	M	TWN	RNG	S	160	40	10	USE (2)	AMOUNT	TYP ADJ (3)	ADJ DATE	PREV ADJ DATE	APPRO DATE	BASIN RANK
AGENCY DITCH	D	PINE RIVER	31	N	33-N	5 W	5	NESESW			IO	.7500CFS	O	10/25/1930		07/25/1860	1
BUCKSKIN DITCH	D	PINE RIVER	31	N	34UN	7-W	23	SWNENW			IO	2.5000CFS	O	10/25/1930		07/25/1860	1
CEANADO DITCH	D	PINE RIVER	31	N	34UN	7-W	18	NENWNE			IO	9.7500CFS	O	10/25/1930		07/25/1860	1
COMMISSIONER DITCH	D	PINE RIVER	31	N	34UN	7-W	26	SWNESE			IO	7.3100CFS	O	10/25/1930		07/25/1860	1
COMMISSIONER DITCH	D	PINE RIVER	31	N	34UN	7-W	26	SWNESE			IO	1.0000CFS	O	06/12/1934		07/25/1860	1
DALE DITCH	D	PINE RIVER	31	N	34UN	7-W	33	SWSWSW			IO	1.0000CFS	O	10/25/1930		07/25/1860	1
DR MORRISON DITCH	D	PINE RIVER	31	N	33-N	7-W	15	SESENE			IO	30.5000CFS	O	10/25/1930		07/25/1860	1
DR MORRISON DITCH	D	PINE RIVER	31	N	33-N	7-W	21	NESWSW			IO	29.7500CFS	O	10/25/1930		07/25/1860	1
DR MORRISON DITCH	D	PINE RIVER	31	N	33-N	7-W	24	SENWSE			IO	29.7500CFS	O	10/25/1930		07/25/1860	1
DR MORRISON DITCH	D	PINE RIVER	31	N	33-N	7-W	14	SESENE			IO	29.7500CFS	O	10/25/1930		07/25/1860	1
DR MORRISON DITCH	D	PINE RIVER	31	N	33-N	7-W	14	SESENE			IO	.5000CFS	O	10/25/1930		07/25/1860	1
DR MORRISON DITCH	D	PINE RIVER	31	N	33-N	7-W	14	SESENE			IO	1.0000CFS	O	10/25/1930		07/25/1860	1
DR MORRISON DITCH	D	PINE RIVER	31	N	33-N	7-W	24	NWSESW			IO	7.1700CFS	O	10/25/1930		07/25/1860	1
LA BOCA DITCH	D	PINE RIVER	31	N	33-N	7-W	24	NWSESW			IO	3.0000CFS	O	06/12/1934		07/25/1860	1
LA BOCA DITCH	D	PINE RIVER	31	N	33-N	7-W	24	NWSESE			IO	.5000CFS	O	10/25/1930		07/25/1860	1
LA BOCA DITCH	D	PINE RIVER	31	N	33-N	7-W	24	NWSESE			IO	1.0000CFS	O	10/25/1930		07/25/1860	1
MOORE DITCH	D	PINE RIVER	31	N	33-N	7-W	26	SWSWSW			IO	1.0000CFS	O	10/25/1930		07/25/1860	1
MOORE DITCH	D	PINE RIVER	31	N	33-N	7-W	26	SWSWSW			IO	.5000CFS	O	10/25/1930		07/25/1860	1
NANNICE DITCH	D	PINE RIVER	31	N	33-N	7-W	26	SWSWSW			IO	4.2500CFS	O	10/25/1930		07/25/1860	1
NANNICE DITCH	D	PINE RIVER	31	N	33-N	7-W	26	SWSWSW			IO	.5000CFS	O	10/25/1930		07/25/1860	1
SEVERO DITCH	D	PINE RIVER	31	N	33-N	7-W	26	SWSWSW			IO	81.1000CFS	O	10/25/1930		07/25/1860	1
SPRING CREEK DITCH	D	PINE RIVER	31	N	33-N	7-W	15	SENENE			IO	1.0000CFS	O	06/12/1934		07/25/1860	1
SPRING CREEK DITCH	D	PINE RIVER	31	N	33-N	7-W	15	SENENE			IO	.7000CFS	O	06/12/1934		07/25/1860	1
WAITS-GRANT DITCH	D	PINE RIVER	31	N	33-N	7-W	15	SESWNW			IO	3.0000CFS	O	10/25/1930		07/25/1860	1
WAITS-GRANT DITCH	D	PINE RIVER	31	N	33-N	7-W	15	SESWNW			IO	.5000CFS	O	06/12/1934		07/25/1860	1
WAITS-GRANT DITCH	D	PINE RIVER	31	N	33-N	7-W	15	SESWNW			IO	3.0000CFS	O	10/25/1930		07/25/1860	1
WAITS-GRANT DITCH	D	PINE RIVER	31	N	33-N	7-W	15	SESESW			IO	.5000CFS	O	06/12/1934		07/25/1860	1
WEST SIDE DITCH	D	PINE RIVER	31	N	33-N	7-W	15	SESESW			IO	24.7500CFS	O	10/25/1930		07/25/1860	1
WEST SIDE DITCH	D	PINE RIVER	31	N	34UN	7-W	11	SENENE			IO	24.7500CFS	O	06/12/1934		07/25/1860	1
BEAN DITCH	D	PINE RIVER	31	N	34UN	7-W	23	SWSWSW			IO	6.7900CFS	O	06/12/1934		07/25/1860	1
THOMPSON-EPPERSON DITCH	D	PINE RIVER	31	N	34UN	7-W	11	SWNESE			IO	11.5000CFS	O	06/12/1934		07/25/1860	1
LOS PINOS IRG DITCH	D	PINE RIVER	31	N	35-N	7-W	35	NESWNE			IO	5.2500CFS	O	06/12/1934		07/25/1860	1
WOHNER IRRIGATION DITCH	D	PINE RIVER	31	N	35-N	7-W	35	NESWNE			IO	84.0000CFS	O	06/12/1934		07/25/1860	1
BEAN CR AND PINE R DITCH	D	PINE RIVER	31	N	35-N	7-W	35	NESWNE			IO	3.5000CFS	O	06/12/1934		07/25/1860	1
CITIZENS IRR DITCH	D	PINE RIVER	31	N	35-N	7-W	11	NENWNE			IO	1.0000CFS	O	06/12/1934		07/25/1860	1
HIGBEE IRRIGATION DITCH	D	PINE RIVER	31	N	35-N	7-W	11	NENWNE			IO	2.0000CFS	O	06/12/1934		07/25/1860	1
WALLACE GULCH DITCH	D	WALLACE GULCH	31	N	35-N	7-W	29	SWSWSW			IO	3.3300CFS	O	06/12/1934		07/25/1860	1
MYERS AND ASHER DITCH	D	PINE RIVER	31	N	34-N	7-W	27	SESESW			IO	.3000CFS	O	06/12/1934		07/25/1860	1
KING DITCH	D	PINE RIVER	31	N	34-N	7-W	11	NWNWNE			IO	9.0000CFS	O	06/12/1934		07/25/1860	1
E C TAYLOR DITCH	D	PINE RIVER	31	N	36-N	6-W	11	NWSENE			IO	4.0000CFS	O	06/12/1934		05/15/1881	120
TAYLOR DITCH	D	VALLECITO	31	N	36-N	6-W	17	NWNWNW			IO	2.0000CFS	O	06/12/1934		05/15/1881	120
PALMER DITCH	D	RED CREEK	31	N	36-N	6-W	24	SWSWNW			IO	21.0000CFS	O	06/12/1934		05/15/1881	120
SCHRODER IRG DITCH	D	PINE RIVER	31	N	36-N	6-W	25	NWNWSW			IO	27.1200CFS	O	06/12/1934		05/15/1881	120
FARRELL DITCH	D	PINE RIVER	31	N	36-N	6-W	25	NESESE			IO	10.0000CFS	O	06/12/1934		05/15/1881	120
GRIMES DITCH	D	VALLECITO	31	N	37-N	6-W	32	NESESE			IO	1.2500CFS	O	06/12/1934		03/01/1882	120
GRIMES DITCH	D	VALLECITO	31	N	37-N	6-W	32	NESESE			IO	1.0000CFS	O	06/12/1934		03/01/1882	120
NEWSLEY SPRING DITCH	D	VALLECITO	31	N	36-N	6-W	29	SWSESE			IO	.5000CFS	O	06/12/1934		05/15/1881	120
ISLAND DITCH	D	PINE RIVER	31	N	34-N	7-W	11	NWSENW			IO	1.0000CFS	O	06/12/1934		07/01/1882	120
BENNETT-MYERS IRR DITCH	D	PINE RIVER	31	N	36-N	7-W	16	SESWSW			IO	4.0000CFS	O	06/12/1934		08/01/1882	120

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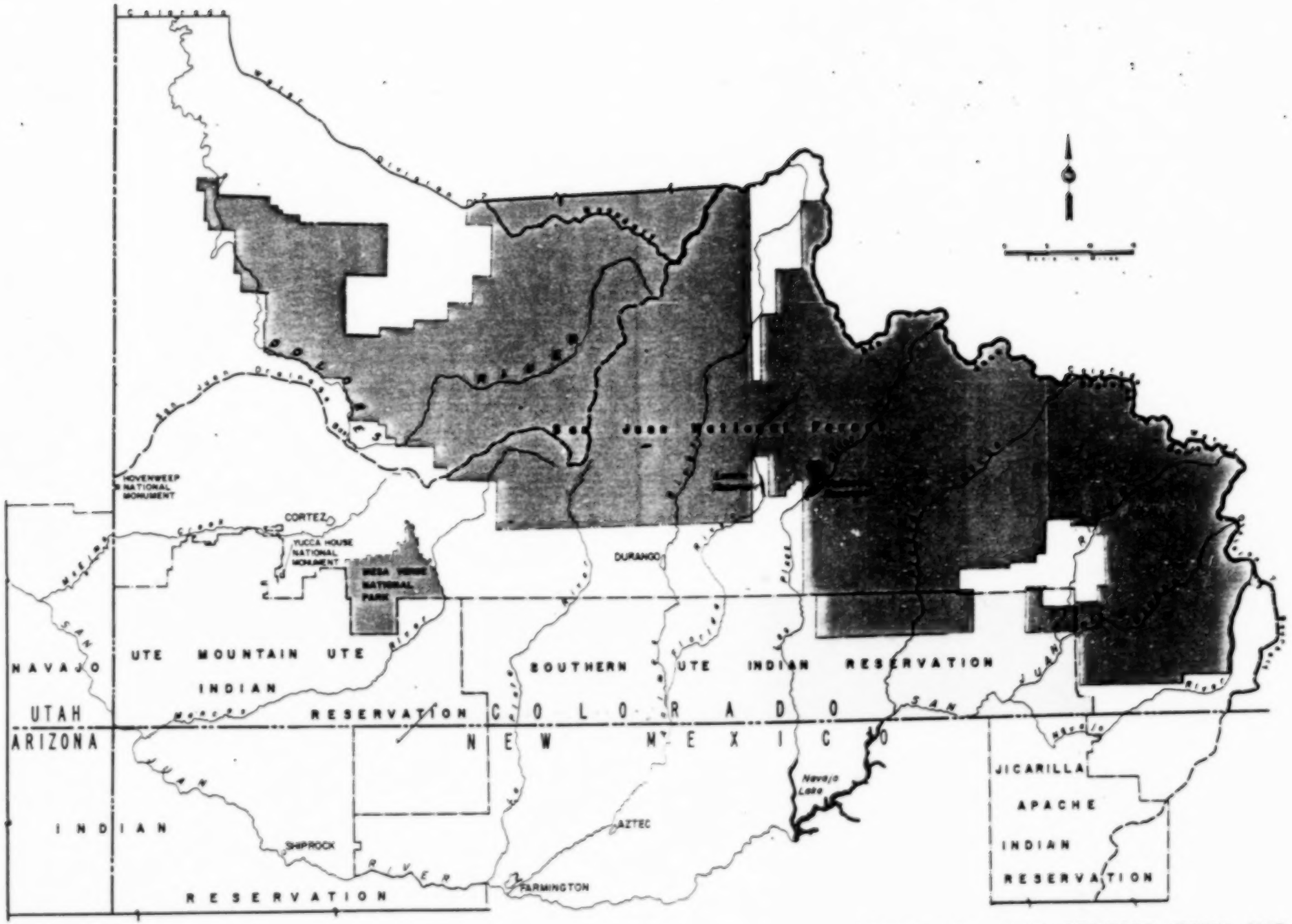

UPPER SAN JUAN DRAINAGE BASIN MAP

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

Nos. 74-940 and 74-949

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-940

THE COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

No. 74-949

MARY AKIN, ET. AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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(Continued on Page 2 Cover)

January 1976

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Exhibit 3. Court Order in *New Mexico ex rel. Reynolds* v. *U.S., et al.*, No. 75-199M Civil, U.S.D.C., N. Mex., October 23, 1975 (unreported). 48, 14e

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-940

THE COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

No. 74-949

MARY AKIN, ET. AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR THE PETITIONERS

SUMMARY OF REPLY ARGUMENT

In opposing certiorari the United States said that whether this case should be in a federal or state court concerns ". . . nothing more or less than a choice of forum question" (Br. in Opp. 5), noting that since federal and Indian reserved rights are involved the federal court was the more "appropriate" or "desirable" forum (Br. in Opp. 10, 11). In its brief on the merits, however, the government tells us that there really is no choice—that because the United States included claims for reserved rights for two Indian reservations along with all of its other claims for appropriative and reserved rights for many other purposes, the case may be heard *only* in a federal court.

On this view, of course, the question of the appropriateness of invoking the principles of abstention and comity, upon which the courts below decided the case and which was the issue we presented to this Court on certiorari, is really not here.

This anomaly should be rejected. As we noted in our reply memorandum (at 3) to the brief in opposition, "There is nothing in either of the decisions below holding that such claims must be adjudicated in the federal courts." Indeed, the government told the court below that whether the state court had the requisite jurisdiction was not directly involved in this case and accordingly resolution of this issue was not necessary and should not be made.[1]

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[1] The Government's brief to the Tenth Circuit states (at p. 16):

> The question of whether state courts under Section 666 possess the requisite jurisdiction to join the United States as defendant in stream adjudication actions, where the reserved water rights involved are held by the United States as trustee for Indian tribes, is not directly involved. *One of the reasons for the district court's abstention and dismissal was its belief that the state courts had the requisite jurisdiction. Resolution of this issue is not necessary here and should not be made in a dispute, such as this, where it is not directly involved.* We believe, however, that state courts do not possess the jurisdiction to join the United States in stream adjudication actions to adjudicate reserved water rights which the United States holds in trust for Indian tribes. (Emphasis supplied).

While both courts below agreed that *Eagle County*, 401 U.S. 520 and *Water Division 5*, 401 U.S. 527, did not require exclusive jurisdiction in state courts, neither the district court nor the circuit doubted that there was state court jurisdiction. Indeed, the district court affirmatively held (Pet. App. 20a):[2]

> . . . we are of the view the state forum can fully and adequately adjudicate the issues in this litigation, be they the national forests, the Indian tribes or any other individual litigants. . . .

and the circuit, without demurring to this holding, said (Pet. App. 9a):

> [The McCarran Amendment, 43 U.S.C. 666] permits, but does not necessarily require, the United States being subjected to state jurisdiction.

Where the courts below disagreed—and the reason we sought review here—was in the application of the principles of abstention and comity to permit the ongoing state proceeding in Water Division 7 (where claims to the same water were already pending under Colorado's 1969 Act) to consider the whole community of claims, including *all* claims of the United States, as this Court held appropriate in *Eagle County* and

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[2] As in our initial brief, Pet. App. references herein are to the appendix in the petition in No. 74-940 unless otherwise noted.

Water Division 5. We believe that the district court's consequent invocation of abstention and comity should not have been reversed; and we further believe that at least in the circumstances of this case, once becoming a party to the Water Division 7 proceedings through service under McCarran (43 U.S.C. 666) and submitting *some* of its claims, the United States should have filed *all* of its claims, as McCarran plainly intends.[3]

The protracted brief of the United States is occasioned by belaboring at least two non-issues. The first of these is the government's suggestion that abstention in water rights cases amounts to repeal of federal court jurisdiction (Br. 12). The doctrines of abstention and comity as applied in the circumstances here can hardly be characterized as a repeal of jurisdiction, any more than their invocation in any other case, and we make no claim for this result. In this connection we think the government misreads the application of these doctrines and will treat this briefly in I below.

Secondly, the government repeatedly reargues throughout its brief the legislative history of the McCarran Amendment and the issues already decided

[3] § 666(a)

. . . The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

thereunder by this Court in *Eagle County* and *Water Division 5,* including the proposition that Congress in 43 U.S.C. 666 provided for the adjudication in state courts of U.S. claims to reserved water rights. This Court was faced in those cases, as it is here, with protestations of possible unfair treatment by state courts as well as by assertions of superior expertise in the federal tribunal over the state water judges (Br. 18, 45). All this has already been quite appropriately brushed aside by this Court in its recognition that these suits involve "the whole community of claims," and thus that the United States should be joined (as proclaimed in the Senate report and set forth in *Eagle County* at 525):

> ". . . in a suit wherein its is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value."

The three year legislative history of the McCarran Amendment was covered in detail in the briefs in *Eagle County and Water Division 5.*[4] The reason, of course, was that those cases posed identical questions of jurisdiction under that statute and thus this Court was faced with deciding McCarran's reach. The government asked this Court both in seeking certiorari to the

[4] The major exposition is found in the *Eagle County* Brief for the Respondents and Intervenors, No. 87, O.T. 1970, pp. 6-7, 11-29, Exhibits 1-6. See also *Water Division 5,* Brief of Respondent Court and Colorado River Water Conservation District, No. 812, O.T. 1970, pp. 14-17 and fn. 14, 17.

Suprm Court of Colorado and in briefing the merits in both cases:[5]

> Whether in enacting 43 U.S.C. 666 Congress intended to consent to suits against the United States in State courts for adjudication of its reserved water rights not predicated on State law.

Even though we were respondents we strongly supported the grant of certiorari in both cases because of the importance of an early definitive construction of the reach of the statute to the orderly adjudication and administration of claims to the use of water,[6] similarly asking this Court in both cases:[7]

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[5] U.S. Petition, No. 1178, O.T. 1969, p. 2 and Brief for the U.S., No. 87, O.T. 1970, p. 2 (*Eagle County*); and U.S. Petition, No. 812, O.T. 1970, p. 2 and Brief for the U.S., No. 812, O.T. 1970, p. 2 (*Water Division 5*).

[6] Brief of Respondent Court and Colorado River Water Conservation District in Support of Certiorari, No. 1178, O.T. 1969, p. 5 (*Eagle County*); Memorandum of Respondent Court and Colorado River Water Conservation District in Response to U.S. Petition, No. 812, O.T. 1970, p. 1 (*Water Division 5.*) Our support of granting certiorari also noted (*Eagle County* filing, p. 5)

> It might be argued that decision in this controversy should be withheld until the United States has actually specified all of its claims, including those claimed as reserved rights, and the Colorado court has decided the amounts and the priority dates for each in the context of all of the other claims put forth. *But the jurisdictional question would apparently remain at the threshold of any later effort in this Court. It should be decided now, before further precious time has been lost and considerable further expense has been entailed.* (Emphasis supplied).

[7] Brief for Respondents and Intervenors, No. 87, O.T. 1970, p. 2 (*Eagle County*); Brief of Respondent Court and the Colorado River Water Conservation District, No. 812, O.T. 1970, p. 5 (*Water Division 5*).

> Whether upon joinder of the United States pursuant to 43 U.S.C. 666 the United States must present all of the water rights it owns or claims, including those it may claim as reserved rights, for adjudication with the claims of others.

This Court responded unequivocally and affirmatively in both cases, holding McCarran to be an "all-inclusive statute" covering all claims of the United States "without exception." Accordingly, the question about claimed reserved rights in a state forum, including those claimed on behalf of Indians, has already been decided and is res judicata.

While the government's effort at reargument must thus be rejected, we will revisit some of the legislative history of McCarran in II below to show that claims of the United States on behalf of Indians were clearly intended by Congress to be within the scope of that statute. Further, we will show that both the United States and their amici understood this and clearly affirmed by this post-*Eagle County* and *Water Division 5* actions and statements. If they really feel it necessary they should continue to complain to the Congress, not here.

I.

THE DISTRICT COURT'S DEFERRAL TO THE ONGOING STATE PROCEEDINGS REFLECTS A PRACTICAL JUDGMENT IN THE BEST TRADITIONS OF COMITY AND ABSTENTION.

The government repeatedly mischaracterizes the objectives of the district court and the petitioners in this action. The contention that we have attempted to "oust federal jurisdiction" (Br. 38) by "forcing" the United States to litigate in state court (Br. 33)[8] does

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[8] See also U.S. Br. pp. 12, 15, 21-22, 43.

not address the true objectives set down by this Court in fashioning the principles of comity and abstention. The question here is identical to the question stated in *Burford* v. *Sun Oil,* 319 U.S. 315, 318 (1943):

> . . . While many other questions are argued we find it necessary to decide only one: Assuming that the federal district court had jurisdiction should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?

In determining that abstention was justified in *Burford,* the Court supplemented the application of the doctrine as outlined in *Railroad Comm. of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941) to recognize that state courts should be permitted the opportunity to adjudicate important issues of local policy. As in this Court's later decision in *Alabama Public Service Comm.* v. *Southern Railway Co.,* 341 U.S. 341 (1951) *Burford's* application of abstention was based largely on comity, or non-interference with a state's internal affairs. The government misreads *Burford* in contending that "unsettled issues of state law" are required for abstention. The "difficult state questions" there, as here:

> . . . so clearly involve basic problems of [state] policy that equitable discretion should be exercised to give the [state] courts the first opportunity to consider them. . . .[9]

The government in effect argues (Br. 36) that the mere fact that it was the United States that brought

[9] 319 U.S. at 332. The government oversimplifies in contending "there is no uncertainty in the basic state law" (Br. 35). Both the application and the administration of Colorado's Water Rights Determination and the Administration Act of 1969 are of fundamental importance and are not simple undertakings.

this action in federal court asserting federal claims among others, precludes the invocation of the district judge's discretionary powers to defer to an ongoing state proceeding. But this Court made it clear in *Eagle County* and *Water Division 5* that state courts could properly determine all federal claims to water with this Court available should any collision on those rights require review. Thus, the assertion of claims to water rights by the United States cannot alone be considered sufficient grounds to require a federal forum. Instead, it is only one factor to be considered by the district court in deciding whether to defer to the state forum. This applies as well to the government's contention that a federal court must exercise its jurisdiction if the plaintiff has chosen to bring the suit there, citing *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964) (Br. 35). That case not only involved federal constitutional claims, which we do not have here, but was also qualified as "not involving the possibility of unwarranted disruption of a state administrative process" (*id.* at 415, fn. 5).

The government's attempt to place added weight on the importance of the United States' position as plaintiff, by reference to the American Law Institute's *Study of the Division of Jurisdiction Between State and Federal Courts* (Br. 36), must be counterbalanced by the statement elsewhere in that same study concluding that the federal court should stay its hand in:

> . . . actions challenging state administrative orders regarding the conservation, production, or use of minerals, water, or other like natural resources of the state. The strong state interest in these natural resources, the complex regulatory systems

> commonly provided for them by the states, and the perplexities, both geological and economic, that controversies as to such resources present all argue in favor of leaving their resolution to the states, with ultimate review in the Supreme Court of the United States. (Commentary on § 1371, p. 287-88).[10]

The government's dependence on *Leiter Minerals, Inc.* v. *U.S.*, 352 U.S. 220 (1957) (Br. 37-38) is also misplaced. There an important element in the balance between courts was the fact that all the parties to the suit were joined in the federal action, while the United States was not a party to the state suit (*id.* at 226-227). Just the opposite circumstances exist here. Indeed, while claiming that it has achieved McCarran's purpose to determine all rights to the use of water in one proceeding by instituting suit, the government contradicts itself by noting that its suit is not a general adjudication but seeks only to establish the rights of the United States (Br. 21, fn. 14).

The government's use of *Pacific Live Stock* v. *Oregon Water Board*, 241 U.S. 440 (1916) to support its argument is, at best, misleading. In context, even the sentence partially quoted (Br. 40) is contrary to the government's position. The full sentence and context follow (241 U.S. at 447):

> The rule that where the same matter is brought before courts of concurrent jurisdiction, the one first obtaining jurisdiction will retain it until the controversy is determined, to the entire exclusion

[10] This of course was precisely the way the matter was treated by this Court in *Eagle County* and *Water Division 5*, even though arising in jurisdictional terms and not by way of stay and abstention or comity. It was also precisely the result reached by the district court below.

> of the other, and will maintain and protect its jurisdiction by an appropriate injunction, *is confined in its operation to instances where both suits are substantially the same;* that is to say, where there is identity in the interests represented, in the rights asserted, and in the purposes sought. . . . *This is not such an instance.* (Emphasis supplied)

On facts remarkably similar to those presently before the Court, the two suits in *Pacific Live Stock* were found sufficiently divergent to avoid the so-called "priority" rule and to allow the all-inclusive state adjudication to engulf the limited proceeding in federal court. As above noted, this same divergence, on the government's own admission, pertains here.

The government and its amici overlook the fact that without a unified system of adjudication and administration of water rights within a state, which includes all rights, however derived, the very claims they seek to protect are in doubt and the determination of these rights together with all others, which the McCarran Amendment sought to achieve, is lost. There are continual and innumerable questions arising within the state water courts of Colorado concerning the use of water, most of which never involve use of waters on reservations of the United States, be they Indian or non-Indian. The variety of these questions and their complexity are well known to this Court from its recent review of Colorado law in *Eagle County* and *Water Division 5*, and in recognition thereof the district court very wisely abstained.

In *Eagle County* Mr. Justice Douglas made specific reference to the Court's discussion of reserved rights in *Arizona* v. *California*, noting that while there the Court was "primarily concerned with Indian reserva-

tions" there were other "federal enclave[s]" (401 U.S. at 523) involved for which specific claims were made, including a national forest, a national recreation area, and two national wildlife refuges (*Arizona* v. *California,* 373 U.S. at 601).[11] The diversity of the "federal enclave" was further illustrated in *Water Division 5* when the Court noted (401 U.S. at 528-29):

> The area covered by this suit covers vastly more extensive water rights than those involved in the *Eagle County* case. The Forest Service administers four separate national forests in the area: the White River, Arapaho, Routt, and Grand Mesa-Uncompahgre. The Department of the Interior, through the Bureau of Reclamation, the National Park Service, the Bureau of Land Management, the Bureau of Mines, and the Bureau of Sport Fisheries and Wildlife, make use of water in Water Division No. 5 for national recreational and other purposes. The Department of the Navy administers certain naval petroleum and oil shale reserves which, if ever developed, would require water to accomplish the federal purpose for which the reservations were made.

Despite the variety of the reservations and their purposes this Court had no doubt that they fell within the scope of McCarran as covered in *Eagle County*

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[11] It may be recalled that Special Master Simon Rifkind declined to reach the same kinds of claims by the U.S. in *Arizona* v. *California,* affecting tributaries, made for the benefit of Indian reservations, national forests, parks, recreation areas, memorials, monuments and lands administered by the Bureau of Land Management (Special Master's Report, filed with the Court December 5, 1960, p. 324). He found "such purely local claims" (*id.* at 332) involved "matters of intrastate rights and priorities" (*id.* at 334) and "myriad individual users" (*id.* at 255) which should not be adjudicated in that suit.

(401 U.S. at 529) and went on to say that the *Water Division 5* proceeding (401 U.S. at 529):

> . . . like the one in the *Eagle County* case reaches *all claims,* perhaps month by month but inclusively in the totality; and, as we said in the other case, if there is a collision between prior adjudicated rights and reserved rights of the United States, the federal question can be preserved in the state decision and brought here for review. (Emphasis supplied.)

There is no question here about the existence of like "federal enclaves" within the area of Water Division 7 or claims to the use of water for those enclaves. What is involved here is the extent and influence of those claims and rights on the rights and claims of over 1,000 other named claimants, and unnamed others. The priority thereof and the quantity in relation to all others can be established most economically, expeditiously, and certainly by the Colorado water court, under Colorado's 1969 Act which provides for notice to all claimants and a resulting decree which will be effective for all claimants, as distinguished from the suit instituted by the United States in the Denver district court, which the United States concedes is one only to establish its rights and not a general adjudication (Br. 21, fn. 14). This concession is totally out of joint with the simultaneous discussion of what the United States calls the limited purpose of McCarran (Br. 21):

> . . . to assure that the sovereign immunity of the United States could not be asserted to prevent a complete determination of *all rights* to use a stream in the process of general adjudication prevailing in many states (citing *Eagle County* and *Water Division 5;* emphasis supplied).

which the United States further recognizes was articulated by the court below as intended "to prevent frustration of the parties because of inability to obtain jurisdiction over the United States" (Pet. App. 7a). This concession also exposes as specious the assertion of the government that when it sues as a plaintiff the purpose of McCarran is satisfied. If McCarran stands for anything, it stands for a general adjudication, not for the single-minded determination of federal claims. This Court's pronouncements in that regard are clear, from *Dugan* v. *Rank*, 372 U.S. 609 (1963) to *Eagle County* and *Water Division 5*.

In sum, the reversal by the circuit was wrong. The district court properly considered and weighed the many special circumstances involved here, in light of this court's instructions in *Burford,* in deferring ". . . for a totality of the reasons expressed under the doctrine of abstention or by comity" (Pet. App. 20a), to the ongoing proceedings before the Water Division 7 court.

II

CLAIMS TO RESERVED RIGHTS ON BEHALF OF INDIAN RESERVATIONS WERE INTENDED TO BE WITHIN McCARRAN AND CONGRESS HAS TAKEN NO ACTION TO CHANGE THIS.

The government tells the Court that if the Court disagrees with its contentions that the district court has jurisdiction (which is not in dispute) and that the doctrines of abstention and comity are inapplicable (which we do dispute), then the Court must decide whether McCarran included state court jurisdiction of claims of the United States to water on behalf of Indians.

As we have already noted, this question was certainly decided in the affirmative by the district court, and we think agreed to by the circuit which construed *Eagle County* and *Water Division 5* as finding that McCarran ". . . authorized a concurrent jurisdiction within state courts to try federal water rights cases—concurrent with the jurisdiction of the federal courts under [U.S.C.] § 1345, . . ." (Pet. App. 8a). This certainly has to include federal Indian claims.

The United States did not seek certiorari in this case, nor did we on this question. Nor need the Court exhume this matter for direct treatment here because the case can and should go off on the wisdom of the district judge in deferring to the state proceedings. If, however, the Court wishes to examine this question further we would note the following:

A. McCarran included claims for Indians

The government's brief concedes defensively, and rather unhappily, that both Justice and Interior participated in the course of Congressional consideration of § 666 wherein both Departments made clear that the proposal would cover the government's claims on behalf of Indians.[12] Despite this the government seeks to argue that the history of McCarran does not reflect a purpose to subject Indian rights to suit in the state courts, suggesting that they were mentioned only "briefly" in the hearings by Justice and in Interior's letter (Br. 59). Our briefs to this Court in *Eagle County* and *Water Division 5* detailed events in Congress over the 1949-1952 period resulting in the enactment

[12] See the government's brief on the merits at 23-29, 58-60. Note particularly the citations to the hearings in fn. 18.

of § 666 in order to demonstrate the general proposition that federal claims *of all descriptions* for reserved rights were covered.[13] In an effort to avoid repeating that detail we will note here only in a summary way some of the specificities of that history showing that when the U.S., in opposing enactment, said it would be required ". . . to claim every right it could conceivably have or need . . ." [14] it specifically included claims for Indians:

1. The Assistant Secretary of the Interior under date of December 22, 1950, wrote to the Director of the Bureau of the Budget giving Interior's views on S. 2305, the original bill leading to the McCarran Amendment.[15] While recommending against enactment, the Assistant Secretary thought there were some circumstances covered by the bill in which the relief it would afford litigants might well be warranted. He observed that the interests of the United States in the

[13] Our briefs are cited in full in fn. 4 *supra*.

[14] Taken from a letter to Senator McCarran dated February 27, 1950, from Peyton Ford, Assistant to the Attorney General, on S. 2305, 81st Cong., 1st Sess. introduced on July 21, 1949 by Senator McCarran, "To Authorize Suits Against the United States to adjudicate and administer water rights." This bill was very similar to § 666 as ultimately adopted three years later. The Ford letter advised that the general waiver of immunity of the United States to suits involving water rights was objectionable because:

> . . . It is likely that such a general waiver would result in the piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions and the joinder of the United States in many actions, in all of which it would be required *to claim every right which it could conceivably have or need* . . . (Emphasis supplied.)

See Senate Judiciary Committee files on S. 2305, National Archives, 81st Cong., Record Group No. 46.

[15] See same Archives file noted in fn. 14, *supra*.

waters of the river systems were so many and varied that a full enumeration of them could not be made without further careful study but among interests he did point out were:

> . . . those which exist by virtue of the creation of Indian reservations under the doctrine of *United States* v. *Winters* (207 U.S. 564 (1908)) or by virtue of the creation of, for instance, a national park; . . .

With regard to these and other of its water interests, the Secretary said:

> . . . Since the United States can be said, with varying degrees of accuracy, to be the 'owner' of rights of any or all these types, it is clear to me that enactment of the bill could lead to a tremendous volume of unwarranted litigation . . .

Nevertheless, the Secretary thought the United States might permit itself to be joined as a party defendant subject to certain qualifications including, significantly for our purposes here:

> (d) the waiver should not extend to rights asserted by the United States for or on behalf of Indians. . . .[16]

2. At Senate hearings on S. 18, April 25, 1951, Mr. William Veeder represented the Solicitor General and

[16] The full range of qualifications by the Secretary follows:

> The qualifications spoken of above which should, I believe, be attached to such a waiver of immunity are these: (a) the waiver should in all instances be limited to an adjudication of those rights of the United States which depend solely upon their having been acquired pursuant to State law and should not extend to those that exist independently of such law; (b) the waiver should not extend to the granting of equitable relief against the United States or to the entering of a judgment for costs against it; (c) the United States should not in any way

the Justice Department as a whole.[17] He discussed with Senator Watkins pending legislation to authorize the joinder of the United States in a prospective suit between Arizona and California over rights to the Colorado River and related this specifically to Senator McCarran's pending bill, S. 18. When asked by Senator Watkins whether the United States had any water rights in the lower Colorado River Basin, Mr. Veeder immediately raised Indian rights, saying (Hearings, pp. 6-7):

> Yes. On Indian rights alone I think there are something like 650,000, I guess higher than that, 1,000,000 acre-feet that they are claiming for Indian rights down there. So we probably could get into court on it. As I say, I hope the proponents of this legislation [S. 18] understand that

be prejudiced in the adjudication by the existence of a prior decree granted in any adjudication to which it was not lawfully made a party; (d) the waiver should not extend to rights asserted by the United States for or on behalf of Indians.

The *only* qualification which was adopted in § 666 was that relating to not assessing costs against the United States. And the right of removal to a federal court which was contained in S. 2305 when these comments were made, was deleted the next year after Justice testimony that two forums should not be provided. The government's brief on this subject (28-31) reflects misunderstanding of the determination of the 82d Congress to enact a law providing for the adjudication of all claims to water in one proceeding. Further, in suggesting that explicit language should have been used to permit removal to state courts from federal courts, the government exhibits a continuing misapprehension, evident in the *Eagle County* and *Water Division 5* proceedings, of the meaning of the second sentence of McCarran as well as the nature of Colorado's 1969 Act in this case.

[17] Hearings on S. 18 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess. (1951), p. 2. S. 18 as introduced was identical to S. 2305 of the 81st Congress.

> this in our estimation has sufficient breadth to authorize that litigation.
>
> Certainly there would be the multiplicity of suits. If the United States could be subject to suit by anyone in any court . . . if there is any dispute at all, they can go into any court and the matter is started immediately—whether the United States will be forced to implead 500 other water users is something else—but I know of no stream system of any size at all in which you wouldn't have a general adjudication if we were sued in connection, for instance, with the Forest Service rights. *If we were sued, we would have to prove* our reclamation rights, *our Indian rights,* the Department of Defense rights, and those are becoming increasingly important. (Emphasis supplied.)

Further (at p. 7):

> *Where the United States is a party the United States of necessity must come in and bring in, for instance its forest service rights, its Indian rights, and when that occurs you must have every one in there or the decree will not be effective* or you will be charged with splitting a cause of action or res judicata, one or the other. (Emphasis supplied.)

There then followed discussion of the Colorado River Compact, with Mr. Veeder saying that the Compact (p. 13):

> . . . specifically provides that the largest user on the Colorado, the largest claimant on the Colorado River, is exempt from it—the Indian service, the Indian rights.
>
> Senator WATKINS. All right. They have taken care of whatever the Indians have, and they act in a trust capacity there, not in their own sovereign right, but in a trust capacity for the Indians.

Mr. VEEDER. But the fact remains that there is a million acre-feet of water the United States owns in there. It doesn't matter how it owns it.

Senator WATKINS. Yes, it does. It makes quite a difference how it owns it. That is the point. It owns it as trustee. The beneficiaries are the Indians and they have prior right to the United States.

Mr. VEEDER. In that regard, Senator, the United States holds everything in trust. It holds this building in trust. The point I am trying to make is that when we start talking about the waiver of immunity of the United States to suit involving the right to the use of water, you get into a multitude of questions that are so complex that one piece of legislation could create havoc through the West. . . .

Mr. Veeder went on (p. 14):

> You have a general waiver of immunity *for every water right in the United States.* You not only have a waiver of immunity, you subject us to the administration of every State. (Emphasis supplied.)

Mr. Veeder thought that the day had come when the government must come forward and indicate the maximum amount of rights it was going to assert so that others downstream would know the extent of the rights and could plan accordingly. He said, however, it could not be done absent an inventory which should be awaited, for otherwise, if the immunity of the United States were waived (p. 17):

> . . . there will be no method for the United States to plan, and we will find ourselves doing what we are doing in Nevada. *Some of the rights were not proved up in the Walker River case* and the United States is going to have to go in and condemn rights which at one time it owned. If it doesn't condemn them, it won't have them. That is all there is to it. . . .[18]

Mr. Veeder thought that specific waivers of immunity might be provided in regard to specific streams but not a general waiver as proposed by Senator McCarran's bill. In this connection he was asked a question relating to the Quinn River and to assume several facts, including the acquisition by the Indian Service of certain lands and water rights following a general adjudication, but later refusal by the federal government through its Indian Service to recognize the adjudication while continuing to divert water in violation of the decree and without paying taxes. Mr. Veeder said that in the circumstances and as things then stood (i.e., without a waiver of immunity) there would not be any possibility of a direct proceeding against the United States (p. 18).

3. On August 3, 1951, the hearings were reconvened (Hearings, p. 37). Notices had been sent to the Solicitor General and to Justice as well as to Interior and other agencies. Only a representative of the Department of Agriculture appeared from the agencies. During this hearing session a lengthy statement was submitted in support of S. 18 on behalf of the Attorney General of Nevada (pp. 44-49) making specific reference to the Quinn River case, adjudicated under Nevada law with a decree entered on April 9, 1919 after some 12 years of litigation. Subsequently, the Carson

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[18] Emphasis supplied. This is an apparent reference to *U.S.* v. *Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939) where the entitlement to waters of the Walker River Indian Reservation was involved.

Indian Agency of the Bureau of Indian Affairs acquired some of the water rights and lands and some years after that difficulties were encountered in the administration of the rights settled by the 1919 decree. An action was commenced in 1949 in state court, which ordered BIA joined, but this was frustrated by the Justice Department in the U.S. District Court for Nevada in July 1949 where sovereign immunity was successfully claimed. The case went back to state court, without the United States as a party, where there were no further proceedings because of the inability of the court to determine the rights held by the United States on behalf of the Indians. This, the Nevada statement said, created a chaotic condition in the efforts of the state to administer the stream and was a throwback to the conditions which existed before the enactment of state water laws as described by this Court in *Pacific Live Stock* v. *Oregon Water Board,* 241 U.S. 440 (47-48).

4. A further hearing session was held on August 8, 1951 (p. 57). Mr. Veeder again appeared, as Special Assistant Attorney General. In this discussion he made a correction to previous testimony to make it clear that his reference in earlier testimony had been to the *Walker River* case (see fn. 18, *supra*). Senator Watkins urged him to make further corrections and submit further views (p. 64) because:

> . . . This is a very important matter—consenting to the United States being sued in these adjudication suits.
>
> We would like to have the position correctly stated.
>
> We do not want any misapprehensions as to what you claim or what you said.

On the understanding that the report of the Justice Department was on the way to the Committee, Senator Watkins urged that it state fully the government's position and extended the privilege of making a further filing, should this not be the case (pp. 65-66).

5. The report of the Justice Department, dated August 3, 1951, appears immediately following the foregoing (pp. 66-67). Again signed by Peyton Ford, this time in his capacity as Deputy Attorney General, the report appears to be nearly identical with the report almost 18 months earlier (see fn. 12 *supra*), again objecting to a general waiver of immunity because (at p. 67):

> . . . It is likely that such a general waiver would result in the piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions, and the joinder of the United States in many actions in all of which it would be required to claim every right, which it could conceivably have or need . . .

6. The Interior Department report is also set out (pp. 67-68), also dated August 3, 1951, and also nearly identical with the report submitted the previous December to the Bureau of the Budget (see paragraph 1 above). In stating interests of the United States which would be involved this letter again refers to (p. 67):

> . . . those which exist by virtue of the creation of Indian reservations under the doctrine of *United States* v. *Winters* (207 U.S. 564 (1908)) or by virtue of the creation of, for instance, a national park; . . .

and again suggests that waiver would be agreeable subject to a right of removal to federal court and other qualifications including (p. 68):

> . . . (e) the waiver should not extend to rights asserted by the United States for or on behalf of Indians.[19]

7. The Senate Judiciary Committee report, issued September 17, 1951, also contained the full text of both the Justice and Interior reports[20] and observed specifically with regard to them (p. 2):

> The committee has taken note of the reports of the Department of Justice and the Department of the Interior printed below which oppose the legislation, but has concluded, after a consideration of all of the evidence available to the committee, that the legislation is meritorious.

8. S. 18 was called on the Senate Calendar on October 11, 1951, but was not fully considered (94 Cong. Rec. 12947-948 (1951)). As the government notes (Br. pp. 59-60) in the time that was allowed Senator Chavez asked a question about Section 2 of the bill, which was not ultimately enacted, providing for a catalog of U.S. claims at Interior. The Chavez question indicates he thought the Interior catalog was to include *all* claims, not only those of the United States, within which Indian claims might be integrated, but those of individual citizens as well. We think Senator McCarran's "negative" (U.S. Br. 60) response was directed to Senator Chavez's misapprehension that rights of individual citizens would be enrolled at Interior, because he plainly said the government could act as trustee for the Indians. The colloquy was cut off, and there was no further consideration at that time.

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[19] As noted in fn. 16 *supra*, the *only* qualification adopted in § 666 was that against assessing the United States for costs.

[20] S. Rept. No. 755, 82d Cong., 1st Sess. (1951), pp. 7-8.

9. On April 2, 1952, the Senate Judiciary Committee issued a Part 2 to S. Rept. No. 755 to accompany an amendment to S. 18 as previously reported. The amendment simply rearranged the language of Section 1 by placing the proscription against waiver of immunity in original suits in a separate subsection. This was done to make it "extremely clear" that provisions now contained in the second sentence of § 666(a) would be applicable to the first part of the section ". . . which authorizes the joining of the United States as a defendant *in any suit* as to the adjudication of rights to the water."[21] The bill as thus amended was considered on the floor of the Senate on June 21, 1952 and passed without further discussion (98 Cong. Rec. 7817-18 (1952)).

10. At about the same time, in connection with a House bill of similar import, the Director of the Bureau of the Budget, reporting adversely to the Chairman of the House Interior Committee,[22] noted:

> . . . The Secretary of the Interior and the Attorney General recommended against the enactment of similar provisions in a bill, S. 18, recently passed by the Senate. As pointed out by these agencies, enactment of such a law would result in a multiplicity of actions and the joinder of the United States in many actions wherein it would be required to claim every right it could conceivably have or need . . .

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[21] S. Rept. No. 755, Part 2, 82d Cong., 2d Sess. (1952), p. 2 (emphasis supplied). The second sentence of § 666(a) is set forth in fn. 3, *supra*.

[22] Letter report on H.R. 7691, dated June 27, 1952, contained in the National Archives, Water Rights Legislation, 82d Cong., Record Group No. 48, File 8 14. See also H.R. 5735 of the same Congress. These bills are shown in full text as Exhibits 5 and 6 of our brief to the Court in ***Eagle County***, pp. 11e-15e.

11. Meanwhile the House had passed a bill providing appropriations for the Justice Department for fiscal year 1953.[23] Section 208 of this bill, which would have barred the use of any funds by Justice to prosecute suits where there were more than 2,500 defendants, was aimed at stopping the Santa Margarita River case, where the government, in connection with its claims to waters for the Camp Pendleton Marine Base near San Diego, had instituted suit against some 3,200 persons in federal district court.[24] The Justice Department wrote to Senator McCarran as Chairman of the Senate Appropriations Subcommittee which would hear the bill, asking the Committee to "eliminate" Section 208.[25] Philip Perlman, Solicitor General of the United States, appeared at the hearings, together with Mr. Veeder. Their discussion of water rights adjudications was wide-ranging, going beyond the Santa Margarita situation where assertion by the government of a "paramount" right had caused problems. Senator McCarran observed (Hearings, p. 1354):

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[23] H.R. 7289, 82d Cong., 2d Sess. (1952). This bill also provided funds for the State and Commerce Departments and the Judiciary for FY 1973.

[24] This precipitated a bitter controversy. The Appendix to the hearings on S. 18, pp. 69-96 contains materials involving this dispute. See also 98 Cong. Rec. 120-129 (1952) where, in commenting on Santa Margarita, Senator Knowland included the texts of S. 18 and S. Rept. No. 755. Some of the proceedings in the case may be found in *U.S.* v. *Fallbrook Public Utility District*, 101 F. Supp. 298, 108 F. Supp. 72, 109 F. Supp. 28, 110 F. Supp. 767.

[25] See Hearings on H.R. 7289 before the Subcommittee of the Senate Appropriations Committee, 82d Cong., 2d Sess. (1952), p. 1339. The Subcommittee had letters from a number of Senators who thought Section 208 might overreach and who preferred a moratorium on the Santa Margarita case until S. 18 or a similar bill could be enacted (Hearings, pp. 1344-47).

> Senator McCarran. The Government came in on the Truckee and the Carson on the basis that the recreation project there had to have water rights. And they set up the suit, the United States States against the Ora Ditch Co. and others.
>
> And then they brought in the Perla Lake Indian Reservation as having a prior right. Never once during that hearing did they assert this paramount right.
>
> Mr. Perlman. Of course not. We wouldn't anywhere, except that California itself seems to require it under its own decisions.[26]

Just prior to this Senator McCarran asked the Solicitor General why Justice opposed S. 18, indicating he thought S. 18 "along this very line" because it lent itself to the determination of water rights, which was not possible in the West without the government and all the water users on the particular system brought in (Hearings, p. 1349). Mr. Perlman thought the real motivation for opposition was because S. 18 might affect suits between states, which Senator McCarran said was not his intention at all (Hearings, p. 1340).

On the basis of this and other discussions (Hearings 1802-1807) the Committee appeared to favor substituting S. 18 for Section 208 and in the Senate Report on the appropriations bill, issued June 24, 1952, the Committee did just that.[27] Two days later the full Senate approved this action (98 Cong. Rec. 8109-8110) and the bill went to conference.

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[26] "Perla" Lake apparently refers to the Pyramid Lake Indian Reservation. See further references in the Hearings, p. 1807.

[27] S. Rept. No. 1807, 82d Cong., 2d Sess. (1952) on H.R. 7289, p. 10. This substitution was of Sec. 1 of S. 18 only and did not include the cataloging provision contained in Sec. 2 of the bill as reported.

12. The Administration reacted promptly by writing identical letters on H.R. 7289 to the Chairmen of the House and Senate Appropriations Committees to express the deep concern of the President ". . . and his hope that the Conferees will support elimination of Section 208"[28] which now contained the first three subsections of S. 18, as passed by the Senate, and presently found in 43 U.S.C. 666. Among the reasons why this section should be eliminated, it was urged, were:

> Section 208, if it were enacted, would permit the United States to be made a party to every "adjudication of rights to the use of water of a river system or other source" and to every adjudication involving "the administration of such rights" whenever the United States was found to be a necessary party to such suit. When one considers the vast diversity of interests that the United States has in interstate and other river systems, the importance of this provision cannot be overestimated. *National parks, Indian reservations, power installations, military and Atomic Energy establishments, and irrigation projects are only a few of the interests that would be affected.* It can be said with certainty that while these provisions are intended to simplify water law administration their enactment could only result in further confusing the issues. A further complicating factor is the possibility that section 208 could be construed to require the United States to appear in State courts endowed with jurisdiction over water rights litigation. To subject Federal interests to the variety of judicial

[28] See letter of June 28, 1952 from Director of the Bureau of the Budget to the Honorable Clarence Cannon, Chairman, House Appropriations Committee, contained in National Archives, Record Group 48, File 1 59, H.R. 7289, 82d Cong., 2d Sess. (1952).

> jurisdictions existing in many State judicial systems would result in a multiplicity of actions and the joinder of the United States in many actions wherein it would be required to claim every right it could conceivably have or need . . . (Emphasis supplied).

Similar arguments were made on behalf of the Administration when the conference reports were considered on the floor of the House but by a roll call vote of 181-119 (98 Cong. Rec. 9446, July 4, 1952) a motion to strike Sec. 208 was defeated. Although there appears to have been some consideration of a veto,[29] the bill was signed into law by the President on July 10, 1952.

Thus, some 3 years after Senator McCarran first introduced this proposal, what we now know as 43

[29] The same Archives file contains a brief memorandum of analysis of Section 208 furnished to then Interior Secretary Chapman for a White House conference on July 9. That memo, in commenting on the probable wide impact on Interior programs, makes specific note that the United States, through the Bureau of Indian Affairs, holds extensive water rights in trust for Indian tribes and among other possible effects suggests "Section 208 may lend itself to an attempt to upset the water rights reserved to and held in trust for Indian Tribes by the Federal Government."

The file also contains the following telegram of July 1, 1952 from the Association on American Indian Affairs, Inc. in New York City to Senators Saltonstall, Lehman, Humphrey, Douglas, Murray, Chavez, Langer, Case, Kefauver, Aiken, Kilgore, and O'Mahoney; and Representatives Fernandez, Roosevelt, Fine, Flood, Marshall, Morris, Eberharter, and Rooney:

> Believe water rights rider in Section 208 of State-Justice-Commerce Appropriations Bill H.R. 7289 (now in joint Senate-House Conference) undermines federal water rights everywhere, including Indian water rights on reservations, federal water rights connected with federal dams, national parks, rivers, and harbors. Interior Department confirms serious consequences of Section 208. May we appeal for your help in calling for elimination of this dangerous rider?

U.S.C. 666 became law. There can be no question from even this synoptic view of the long and detailed consideration of this measure by the Congress that claims by the United States to water for all purposes, including those for Indian reservations, were fully intended to be within its scope.

B. Eagle County and Water Division 5 embrace all claims of the United States, including those on behalf of Indians.

1. The en banc opinion of the Supreme Court of Colorado in *Eagle County* decided September 15, 1969 (169 Colo. 555), contains many references to claims to water for Indians. That court was faced with the government's contention that McCarran applied only where there was a general adjudication involving the claims of *all* of the water users (at 561). The court went through the Senate Judiciary Committee report in detail as well as other materials in the legislative history and concluded that there was no doubt of McCarran's application (564-67). Specific reference was made to many of the river systems in Colorado, including the San Juan (the subject of the present litigation); to the trepidation of the Justice Department about federal water rights under state jurisdiction (570); and to the nature of reserved rights asserted by the United States under a number of cases in this Court, including those on behalf of Indians under *Arizona* v. *California,* 373 U.S. 546 and *Winters* v. *U.S.,* 207 U.S. 564 (at 573-76). In noting that water rights in Colorado were ". . . of the greatest importance to the welfare and economy" of the people of Colorado, and of considerable importance to the United States, the court observed (579-80):

> . . . of the 66½ million acres of land in Colorado, the United States has 36.4% or about 24⅓ million acres in the form of public domain, national forests, national parks and monuments, military reservations and an Indian reservation.
>
> We have a situation in which the federal sovereign claims water rights which are nowhere formally listed, which are not the subject of any decree or permit and which, therefore, are etheric in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure--and this is equally true from the standpoint of the United States as well as Colorado and its citizenry.

In holding specifically that McCarran was intended to grant jurisdiction over the United States with respect to reserved water rights (at 581) the Colorado Supreme Court pointed directly to the report of the Interior Department of August 3, 1951 and quoted that portion of the letter which included Interior's reference to the water interests of the United States ". . . which exist by virtue of the creation of Indian reservations under the doctrine of *United States* v. *Winters.*" The court concluded (at p. 582):

> . . . We are holding here that *whatever* rights the United States has to water can be recognized and adjudicated by our district courts just as adequately as in any other forum—and perhaps more adequately. Therefore it would seem that no adequate reason exists to withhold reserved rights from the light of day and adjudication. (Emphasis supplied.)

The court refused to go over all this ground again in *Water Division 5.* When the United States sought prohibition the writ was simply denied.

The foregoing makes plain that *Eagle County* and *Water Division 5* came to this Court on the broad question of the scope of consent to suit provisions of McCarran and on the unmistakable holding that *whatever* the claims of the United States, they were subject to definition in the state proceedings.

2. As we noted at the outset, this Court had no doubt that it was addressing itself to the scope of McCarran in *Eagle County* and *Water Division 5*,[30] and found it to be an all-inclusive statute, including appropriative, riparian and reserved rights, with no exceptions.[31] These decisions are of course res judicata as to the government.

Although the government opposed certiorari in the present case, now that the case is here the government tries to use it to relitigate *Eagle County* and *Water Division 5*. It calls the questions involved in federal reserved rights "alien" to the state tribunals, requiring "expert" treatment by federal courts and suggests that going at it the government's way will ease the "burden" on this Court.[32] The government totally ignores that this Court has already twice decided that state tribunals may be used and twice explicitly assumed the "burden" of looking at any federal questions properly reserved by the United States in the state proceedings (401 U.S. at 526, 529-30). Furthermore, the government blandly overlooks the fact that

[30] In *Water Division 5* the Court noted (401 U.S. at 529):

> The major issue—the scope of the consent to be sued provision in 43 U.S.C. § 666—has been covered in the *Eagle County* opinion and need not be repeated here.

[31] *Eagle County*, 401 U.S., at 524.

[32] U.S. Br. pp. 44-45.

since this Court required it to do so in the 1971 opinions, the government has been presenting federal claims for reserved rights in Water Divisions 4, 5 and 6 in Colorado, as well as the fact that the very same questions it now wants the federal district court in Denver to handle, save only the claims relating to Indians, are already pending in state proceedings.

Nevertheless, still relitigating issues already decided, the government tells this Court that it would really be a simple matter to integrate a federal decree. It is no cause for concern, we are told (Br. 49), that two courts will each have the same 1000 and more litigants before them and each will simultaneously be considering water rights questions in the same watershed, because the questions will be different. This not only overlooks precisely what McCarran avoids but fails to consider the fundamental fact, clearly perceived in McCarran, that there may be different questions but only one stream system to satisfy them.

Even the government has to acknowledge that "It is desirable, of course, that administration of any watershed be unified" (Br. 50). It assures us that existing water rights established in previous adjudications should not have to be relitigated but in the same paragraph talks about "investigating" senior claims, and perhaps pursuing them; possible factual hearings by some "special master" of undefined jurisdiction; and the establishment of a water master who "would merely monitor the state administrative system" (Br. 50). All of these chores, if they be there, are already provided for in Colorado's procedures. The government's arguments in this regard are not only strained but repugnant. Certainly the federal district court has

enough to do without reviewing reports from a "monitor [of] the state administrative system."

The government knows all of these matters were before this Court in *Eagle County* and *Water Division 5* but tries to retread them now on the ground that those cases did not specifically include U.S. water claims for Indian lands. This simplistic approach in an effort to extricate all federal claims from state proceedings should be rejected. We make no pretension that there were specific Indian claims in the 1971 cases, just as there were many other types of reservations, or "enclaves" to use the Court's word, which were not specifically before the Court. What was before the Court was a question far greater than any specific claim—it was the scope, the reach, of the consent to suit in 43 U.S.C. 666 and it was found to be all-inclusive of federal claims, without exception.

The United States shows its awareness that all reserved claims, including those on behalf of Indians, had to be involved in *Eagle County* and *Water Division 5*, because at the time of McCarran in 1952 the implied reservation of water doctrine existed only in connection with Indian reservations. Thus the United States concedes that it may "be argued that the only reserved rights Congress could have had in mind in 1952 were those reserved to Indians" (Br. 62, fn. 50).[33]

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[33] The Indian amici, while misspeaking prophetically, worry about this quite evident proposition also, noting that since Indian rights go back to this Court's 1908 decision in *Winters*, and other federal reservations were not beneficiaries of the implied reservation theory until this Court's 1963 decision in *Arizona* v. *California*:

> . . . it would be easy, but not incorrect (sic), to assume that Congress had Indian reserved water rights squarely in mind when the McCarran Amendment was adopted in 1952 . . .

On our part we can concede that at the time of McCarran the United States was at least thinking of reserved rights as being implied to other types of enclaves as well. For example, the Interior Department in twice reporting on Senator McCarran's bill included in the federal interests which would be affected:

> . . . those which exist by virtue of the creation of Indian reservations under the doctrine of *United States* v. *Winters* . . . or by virtue of the creation of, for instance, a national park;

This only makes all the more clear, however, as this Court found in *Eagle County* and *Water Division 5* that federally reserved lands include any federal enclave, whether Indian reservations, national forests, or naval petroleum and oil shale reserves.

Nevertheless the government insists that since no specific claims to reserved rights for Indian lands were here in *Eagle County* and *Water Division 5*, the question of jurisdiction as to them was not reached.[34] This result however cannot be achieved simply by dropping a wishful footnote in one case. This is so particularly when, a in *Eagle County*, the United States sought certiorari on what it claimed a "clearly separable" issue from the merits of the litigation pending in the state court concerning the relative rights and priorities of water claimants. This separable issue was whether:

> . . . the Colorado district court has jurisdiction under a federal statute [43 U.S.C. 666] to adjudi-

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Indians were at most a confused afterthought. (Amici Brief of Native American Rights Fund 17).

[34] See U.S. Br. 60-61. Fn. 49 at p. 61 refers to the footnote in the U.S. *Water Division 5* brief that Indian rights were not involved in that case.

> cate the water rights of the United States, including its reserved rights . . . (Pet. in No. 87 (No. 1178, Oct. Term 1969) at 9).

And in petitioning for certiorari in *Water Division 5* the government said that the *Eagle County* issue of whether 43 U.S.C. 666 extends to suits against the United States for adjudication of its reserved water rights not predicated on state law ". . . was as squarely presented . . . as in *Eagle County* and needs no elaboration here" (Pet. in No. 812, Oct. Term 1970, at 6). To persuade this Court to take these cases the government advised (Pet. in No. 87, No. 1178, O.T. 1969, pp. 10-11 (*Eagle County*)):

> . . . The magnitude of the problem is indicated by the fact that about 443,000,000 acres have been withdrawn from the public domain for use as Indian reservations, national parks, national forests, national recreation areas, national monuments, etc.[7] It is not an exaggeration to suggest that the decision below raises serious questions about the nature and scope of the federal government's water rights on all of these lands. (Footnote omitted.)[35]

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[35] With regard to all of its claims it may be recalled that in seeking a writ of prohibition the United States told the Supreme Court of Colorado if it (A. 14 in No. 87, O.T. 1970):

> . . . were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date of its reserved and appropriative rights, most of the objections of the United States to these proceedings would be removed. While the United States could not, even then, be joined as a defendant under 43 U.S.C. sec. 666, for the reason that an entire river system would not be involved, the United States would be assured it could have its rights properly adjudicated if it chose to appear as plaintiff in a Colorado Water District adjudication . . .

Note no qualification whatsoever was made as to U.S. claims on behalf of Indian lands.

The foregoing were not the only references to claims on behalf of Indian lands in submissions to this Court in *Eagle County* and *Water Division 5*. Amicus curiae briefs were filed on behalf of many states having Indian populations. The brief on behalf of Colorado, Oregon, Nevada, Idaho, Montana and Alaska specifically quoted the portion of the report of the Interior Department which was before the Senate Judiciary Committee advising that among U.S. interests to be affected were those existing by virtue of the creation of Indian reservations under the *Winters* doctrine, concluding that it seemed indisputable "that the purpose of McCarran was to make possible an effective determination of all water rights from a single source of supply." (Br., pp. 21, 22).[36] The amicus brief of the State of Washington not only made it clear that it had joined the government under McCarran in some nine cases but that its courts had been adjudicating claims to reserved rights of the United States (Br. 9-12). Washington noted that in only one case, *In re Chiliwist Creek,* had jurisdiction been contested by the U.S. and attached a copy of a memorandum opinion by the state court showing that the United States owned land in the watershed and was acting as well as trustee for an Indian ward allottee (Br. 15). Indeed, in that case the United States and its ward, T. B. Charley, removed the case to federal district court and there sought to have the case dismissed. That court remanded the case to the state court.[37] The United States did not appeal,

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[36] Among other amici state filings, Arizona's brief raised Indian claims (Br. p. 10, fn. 3), and their quantification in *Arizona* v. *California* was cited in California's filing (Br. 14).

[37] Opinion dated May 29, 1964, (unreported) in No. 2491, U.S. D.C., Eastern Dist., Wash. (ND), Charles L. Powell, J., appended hereto as Exhibit 1. Note this opinion reserved action on the mo-

but submitted claims for itself and on behalf of T. B. Charley, claiming a reserved right, who was accorded the first priority in the state adjudication.[38] Other cases in the Washington state court said to involve claims on behalf of Indian lands include *In re Bonaparte Creek*.[39] Despite these and other instances referred to below, the Indian amici tell this Court (Br., p. 3), clearly erroneously, "All previous adjudications of Indian water rights have taken place in federal forums . . ."

3. Other actions by government and Indian representatives contemporaneous with and since *Eagle County* and *Water Division 5* show full awareness that federal Indian claims were recognized to be within the scope of those cases:

a. After the opinions of the Court in *Eagle County* and *Water Division 5* were announced, the Fort Mojave Tribe of Indians for itself and several tribes similarly situated, filed in both cases what they denomin-

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tion to dismiss to the state court. The state court rejected that motion. No appeal was taken to the Washington Supreme Court. See fn. 38 *infra*.

[38] Portions of the decree in this case (No. 16323, Superior Court in and for Okanogan County, May 16, 1967) are reprinted as Exhibit 2 to this brief showing that the interests of the United States, in addition to those on behalf of its Indian ward, included an appropriative right on behalf of the Forest Service as well as a claimed reserved right for the Okanogan National Forest. The proceedings were appealed on unrelated grounds to the Supreme Court of Washington. See *In re Chiliwist Creek* (M. G. Walker, Supervisor of Water Resources, State of Washington v. Biles-Coleman Lumber Co. et al.), 77 Wash. 2d 658, 466 P. 2d 513 (1970).

[39] Cause No. 17787, Superior Court for Okanogan County, cited in amicus curiae brief for the State of Washington in *Eagle County*, p. 10.

ated a "Motion for Leave to File Suggestion of Interest, Suggestion of Interest and Points and Authorities in Support Thereof." Among other arguments, these filings asserted that waters flowing from Colorado, including the Eagle River, were essential to the implementation of this Court's decree in *Arizona* v. *California* regarding the Fort Mojave Tribe, and they were thus indispensable parties; that Indians would be irreparably damaged if their rights to water would thereafter have to be adjudicated in state courts, as *Eagle County* appeared to require; that this Court was without jurisdiction, that its *Eagle County* and *Water Division 5* opinions should be vacated, and the cases be dismissed. This Court on May 3, 1971, denied leave to file these documents.[40]

b. Commencing on October 19, 1971, and on various dates thereafter up to January 26, 1972, at various places throughout the country, the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee held hearings on "Administrative Practices and Procedures Relating to the Protection of Indian Natural Resources."[41] Though the hear-

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[40] 402 U.S. 940 (1971). The great bulk of these documents consisted of an Appendix B which characterizes the government's footnote in its *Water Division 5* brief that Indian rights were not involved as "cryptic" and "meaningless on its face" (at pp. 74, 75) and concludes that ". . . the record can only safely be read as including Indian rights" (at p. 87, fn. omitted). At p. 55-65 of an appendix to Appendix B, portions of a statement are reprinted, dated September 25, 1970, apparently presented to the Senate Interior Committee which held hearings on that date on S. 4165, to create an Indian Trust Counsel Authority. This statement leaves no room for doubt that the U.S. case as presented in *Eagle County* comprehended claims to all reserved rights, including those for Indians.

[41] Hearings, 92d Cong., 1st Sess. (1971-72), Parts 1-7.

ings related to numerous matters other than water, testimony on that subject indicates both the Justice Department and the Indians construed *Eagle County* and *Water Division 5* as applicable to all reserved rights including those on behalf of Indians.

The attorney representing the Fort Mojave Tribe testified:[42]

> Now in October of 1970 I received a telephone call from William Veeder. He explained to me that there was a case that had come to the U.S. Supreme Court, the *Eagle River* case, . . .
>
> When Mr. Veeder called me, he explained that this case, if it went in favor of the State, would result very clearly in subjecting the sovereign Indian nations who had these attributes of not being sued to suit whether they wanted to or not.

And further (at 32):

> There are at least seven law firms in this country that deal with Indian matters a great deal and they are prominent firms who have all agreed that this is a great blow because it does encompass Indians, . . .

Although the Justice Department repeatedly assured the Subcommittee they felt the footnote in their *Water Division 5* brief clearly put this Court on notice it was not considering claims for the use of water on Indian lands and thus the result in *Eagle County* and

[42] Hearings, *id.* Part 1, October 19, 1971 at Washington, D.C., p. 25. See statements at pp. 29-31 making it clear the view of this witness that under *Eagle County* Indian claims could be adjudicated in state proceedings. For some statements of similar import by others in Part 1 see pp. 31, 41, 99, 121, 138-141, 150, 159. The *Eagle County* and *Water Division 5* decisions of this Court are reprinted in these hearings at pp. 281-85.

Water Division 5 did not really apply in that context [43] they nonetheless suggested as the surest resolution of this problem:[44]

> Again, as stated above with respect to the question whether or not 43 U.S.C. 666 consents to the adjudication of water rights reserved for the benefits of Indians or Indian tribes, the surest resolution of this problem would be legislation making clear that the United States shall have an undisputed right to remove to the United States District Court any suit which purports to join the United States as a defendant under authority of this statute. You may be interested to know that S. 18, the bill which was eventually enacted as 43 U.S.C. 666, as originally introduced, contained such a provision. This provision was eliminated after a witness speaking for this Department objected to it. However, the Department has since changed its views on the question of removing these cases to the Federal district courts.
>
> We suggest that now may be an appropriate time for the Committee on the Judiciary to alleviate some of the problems which have plagued

[43] At the same time, however, Justice asserted reliance upon portions of *Eagle County* and *Water Division 5* in Indian matters, as follows:

> It is definitely the position of the Department of Justice that the rationale of this portion of the opinion [concerning U.S. authority to reserve water for federally reserved lands] is applicable to Indian water rights and this would be asserted by the Department of Justice in any litigation where the United States is acting on behalf of Indians to protect their water rights. We would also consider the portion of the Eagle County opinion to the effect that questions pertaining to reserved water rights, including the volume and scope of particular reserved rights, are Federal questions subject to review by the Supreme Court, to be applicable to Indian water rights.

[44] Hearings Part 1, p. 14. See also Part 2, pp. 443-44, November 30, 1971, at Washington, D.C.

> our lawyers for years in the defense of actions against the Government under this statute and to consider an amendment which would alleviate the problems created in 1951 when the Department's spokesman objected to the removal provision which was then in S. 18.

Despite this exhortation and others made during the hearings that Congress take some action, it has not seen fit so to do.

c. Further hearings on the proposal to create an Indian Trust Counsel Authority were held on November 22-23, 1971.[45] Among references to *Eagle County* was the following statement made by counsel for a number of Indian tribes:

> . . . pursuant to the recent decision of the Supreme Court in the *Eagle River* case, some western states may attempt to force Indian tribes to enter state proceedings allocating water rights. In these situations, pursuant to 43 U.S.C. § 666, the United States will enter on its own behalf. However, the Authority should be permitted to enter on behalf of the Indian tribes in the name of the United States, since the United States holds the tribes' water rights in trust.[46]

d. In March 1974, the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs held hearings on the various social, economical and political aspects of Indian water rights.[47] The

[45] Hearings on S. 2035, before Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971).

[46] *Id.* at 53. For other mention of *Eagle County* see pp. 79, 103, 122-23, 147, 153.

[47] Hearings captioned "Indian Water Rights", Senate Committee on Interior and Insular Affairs, 93rd Cong. 2d Sess. (1974).

President of the National Tribal Chairman's Association [48] in commenting on studies underway stated:[49]

> We understand that tribes will be able to promulgate water codes and, under authority from the Secretary of the Interior, tribes will be able to regulate and distribute waters among the people on the various reservations.
>
> This will give us a counterpart to the State procedures for filing of water rights and uses and will keep the States from trying to regulate our waters. This is what we want and we encourage this effort.
>
> We understand that there will be proposed a bill to grant Indian water rights jurisdiction exclusively into the Federal court system and keep us out of State tribunals.
>
> This we badly need, as you can see what is happening to the Southern Ute and Ute Mountain cases, which are threatened to end up in a very unfriendly State court.

This witness also had some highly illuminating remarks to make concerning the report of the National Water Commission of which so much is made by the government (Br. 56-57) and the Indian amici (Br. 34). He noted that the Indians had tremendous objections to the Commission's draft report, and that the Commission after being severely criticized, relented and treated Indians in a separate chapter in the final report. Still however, he said Indians had serious problems with the Commission's report and that before any legislation or action were generated by the report Con-

[48] Among amici in this case.

[49] Hearings, *supra* fn. 47, at 5. It may be noted the state does not control the distribution of water below the point of diversion.

gress should hold hearings on it both in the field and in Washington.[50]

Another witness said:[51]

> The Congress, courts, and the States should not equate "Federal waters" with "Indian waters," as they are not the same. The failure to distinguish "Federal waters" from "Indian waters" has resulted in the loss of water rights jurisdiction in the Federal court for the Ute Tribes in Colorado in *United States* v. *Akin*, based on language in *United States* v. *District Court in and for the County of Eagle*. This case should be declared unconstitutional for the citizens of this country have not terminated the power granted to Congress to deal with Indians under the Commerce clause which I already mentioned in this testimony.

And further:[52]

> Once the Indian tribes are brought into State courts or, for that matter, even if they are brought into Federal courts, the attempt is to apply the State doctrine of prior appropriation which simply means, in my opinion, the historical use of water without allowing Indians to plan for the future use of water for increased domestic use demands, commercial and industrial uses, including agriculture, as provided under the Winters doctrine.

While it was thus apparent in these hearings that the Indians did not want water rights adjudicated in state courts, it was also clear they did not want the federal courts applying customary law either and that recom-

[50] *Id.* at pp. 5-6. See also pp. 47, 52.

[51] *Id.* at 46.

[52] *Id.* at 47.

mendations in that regard by the National Water Commission should not receive immediate action. As in the previous hearings they sought legislation ". . . to stop the stealing of Indian waters and assure the proper litigation and adjudication of Indian water rights in Federal courts."[53] Congress, however, has not acted on these suggestions.

C. Public Law 280 did not repeal the McCarran Amendment

Despite the foregoing history the government contends that waiver of immunity in McCarran was only partial as a consequence of the Act of August 15, 1953 (P.L. 280),[54] and particularly that portion codified as 28 U.S.C. 1360, which contains *inter alia* certain limitations on civil jurisdiction granted five states in actions to which Indians are parties (Br. 58). Since there is no specific reference to 43 U.S.C. 666 in P.L. 280, this contention in effect calls for repeal of McCarran by implication as far as claims of the United States on behalf of Indians are concerned. This flies in the face of the rule against such a result[55] and is wholly at odds with the clear purpose of McCarran to bring all claims to water into one proceeding.

A review of P.L. 280 shows that on its face it is inapplicable here. Sec. 1360 applies to causes of action "between Indians or to which Indians are parties" arising on Indian reservations in five specific states, not including Colorado. None of those factors are pres-

[53] *Id.* at 48.

[54] Public Law 83-280, 67 Stat. 588, partially codified as 18 U.S.C. 1162 and 28 U.S.C. 1360, as amended in 1968, 25 U.S.C. 1321-1326.

[55] *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974).

ent. The state proceeding is ongoing under Colorado's Water Rights Determination and Administration Act of 1969, involving the use of waters within Water Division 7, and the United States is a party. In the federal proceeding, the United States is a party advancing many claims, including those on behalf of the Indians but no Indians have appeared as parties. The interests of the state and its citizens in determining and administering water rights, which led to the state proceeding, can hardly be characterized as providing a "cause of action" arising on the reservations for which the government makes claims.

Moreover, Colorado is not one of the five states enumerated in P.L. 280. Colorado has no disclaimer of jurisdiction over Indian matters in its Constitution or Enabling Act; instead, its jurisdiction in certain matters involving Indians, their reservations and property has been recognized. This Court noted in *U.S.* v. *McBratney,* 104 U.S. 621, 623, 624 (1881), a criminal proceeding involving non-Indians on the Ute Reservation:[56]

> . . . the Act of Congress of March 3, 1875, for the admission of Colorado into the Union, authorized the inhabitants of the Territory "To form for themselves out of said Territory a State government, with the name of the State of Colorado, which State, when formed, shall be admitted into the Union upon an equal footing with the original States in all respects whatsoever"; and the Act contains no exception of the Ute Reservation, or of jurisdiction over it.
>
> . . . that [Ute] reservation is no longer within the sole and exclusive jurisdiction of the United States.

[56] See also *Draper* v. *U.S.,* 164 U.S. 240 (1896).

And the Colorado Supreme Court has specifically recognized state court jurisdiction over an action against the Southern Ute Indian tribe by an Indian claiming to have been wrongfully expelled therefrom. In *Martinez* v. *Southern Ute Tribe,* 150 Colo. 504, 374 P.2d 691 (1962), the court noted that the courts of Colorado shall be open to every person and that the tribe by incorporating under federal law had consented to sue and be sued in courts of competent jurisdiction within the United States. Thus, the tribe "has rendered itself amenable to the courts of the State of Colorado in any action of which the state courts may take cognizance." 150 Colo. at 510. See also, *Martinez* v. *Southern Ute Tribe,* 249 F.2d 915 (10th Cir. 1957), cert. denied 356 U.S. 960 (1958).

The legislative history shows that P.L. 280 was concerned principally with the enforcement of law and order on reservations.[57] The civil jurisdiction provisions were added rather belatedly, apparently in furtherance of the termination policy, without any real exposition in the legislative history, save for the express Congressional determination to make the Indians subject "to the same laws and entitled to the same privileges and responsibilities" as other citizens.[58] Were there any history available to support the argument that P.L. 280 bars the applicability of McCarran

[57] This history is reviewed in "Background Report on Public Law 280" prepared at the request of Senator Jackson as Chairman of the Senate Committee on Interior and Insular Affairs, Committee Print, 94th Cong., 1st Sess. (1975). On "law and order" see e.g. 15, 23. S. 2010, supported by Indian groups at hearings held by the Senate Interior Committee on December 3-4, 1975, would repeal P.L. 280 and a variety of related statutes.

[58] *Id.* at 10 for quotation from H. Con. Res. 108, 83d Cong., 1st Sess. (1953).

it doubtless would have been used in the discussion of P.L. 280 in a recent treatise prepared for the Department of Interior. There is no mention there however and indeed elsewhere that document notes:[59]

> The March 24, 1971 Supreme Court decision on the Eagle River case (Colorado) held that Indian water rights are subject to adjudication in State courts under certain circumstances, but if there is conflict between Federal rights (including Indian rights) and State court action, the Supreme Court can take the case for review.[4]
>
> Although the tribes continue to possess the priorities they have always had non-Indians may institute water suits that will require court defense by tribes.[5]

In addition, the government's arguments here under P.L. 280 have been made as well to the U.S. District Court in New Mexico in water litigation involving § 666 and claims on behalf of Indians on the San Juan River in New Mexico. While that court did not rule specifically on the P.L. 280 argument, it remanded to the state court, holding:[60]

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[59] Taylor, *The States and Their Indian Citizens*, U.S. Department of Interior, Bureau of Indian Affairs (1972) at pp. 116-18, footnotes omitted. It should be noted that this treatise was specifically directed at giving special attention to Indian, local and state governmental relationships as well as the role of the Federal Government. See Foreword.

[60] *New Mexico ex rel. Reynolds* v. *U.S. et al.*, No. 75-199M Civil, U.S. D.C., N. Mex., October 23, 1975 (unreported). The court's order is contained in Exhibit 3 hereto. In addition to the state proceedings in New Mexico, counsel for amici states advise water rights held by or on behalf of Indians have been adjudicated or otherwise administered by state forums *e.g.* in Utah through applications for the Ute-Ouray Indian Reservation; in Montana for the Northern Cheyenne in the *Miles City* proceeding, Cause No. 2809, Custer County (1914); in California in the North Fork Pit River Decree (Pit River Indians), Modoc County Court No. 4074 (1939); Shackelford Creek Decree (Quartz Valley Indian Res.), Siskiyou County Court No. 13775 (1950); Bidwell Creek Decree

> The United States was properly before the State Court pursuant to 43 U.S.C. 666 in its capacity as trustee over Indian lands, *Arizona* v. *California*, 373 US 546; *United States* v. *Akin*, 504 F.2d 115 (10th Cir. 1974) (where the United States brought the action as Plaintiff on behalf of two Indian tribes); and *United States* v. *District Court of Eagle County*, 401 US 520. The right of removal which the United States seeks to exercise is not implicit in 43 U.S.C. 666, nor in the mere fact that the United States is a defendant.

In addition to the reasons already given for the specific inapplicability of P.L. 280 here, this Court has recognized that ". . . notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating non-Indians," *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 171 (1973) referring in this regard to the Court's landmark decision in *Williams* v. *Lee*, 358 U.S. 217 (1959). There, while finding that the state did not have jurisdiction, the Court reviewed modifications of *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) ". . . in cases where essential tribal relations were not involved and where the rights of the Indians would not be jeopardized, . . ." (*Williams, supra* at 219). This test, applicable principally to situations involving non-Indians (*McClanahan* at 179), is ideally suited to the present case, for here we have some 1,000 named parties, as well as unnamed others, having claims which will be affected by those urged by the United States, including those urged on behalf of Indians.

(Fort Bidwell Indian Res.), Modoc County Court No. 6420 (1960). Among state cases holding P.L. 280 not the exclusive means by which state jurisdiction is exercised see *State ex rel. Iron Bear* v. *District Court*, 162 Mont. 335, 512 P.2d 1292 (1973), *State* v. *Warner*, 71 N.M. 418, 379 P.2d 66 (1963), *Anderson* v. *Britton*, 212 Ore. 1, 318 P.2d 291 (1957).

In a "monumental" work on Indian law[61] it is stated:

> . . . [S]tate jurisdiction in any matters affecting Indians can be upheld only if one of two conditions is met: either that Congress has expressly delegated back to the state, or recognized in the state, some power of government respecting Indians; or that a question involving Indians involves non-Indians to a degree which calls into play the jurisdiction of a state government.

These pre-P.L. 280 criteria are substantially the same as laid down by this Court in *Williams* and *McClanahan supra*. See also *Orangized Village of Kake* v. *Egan*, 369 U.S. 60 (1962). In our view the criteria are clearly met here, for McCarran plainly covers all claims of the United States, including those for Indians, and non-Indians are involved in a way necessitating state jurisdiction.

There is thus room for both statutes and no need ". . . to pick and choose among congressional enactments . . ." which the Court inveighed against in *Morton* v. *Mancari*, 417 U.S. at 551, citing the duty to regard each of the enactments effective absent a clear congressional intention to the contrary. This is not a suit on a debt arising on a reservation as in *Kennerly* v. *District Court*, 400 U.S. 423 (1971) and *Williams* v. *Lee*, *supra*, nor does it involve a personal tax as in *McClanahan*, *supra*, all of which found the protection of P.L. 280. This proceeding goes well beyond internal reservation concerns, to the borders of Water Division 7 and all of the property within it.

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[61] *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), separate opinion at 159, referring to *Handbook of Federal Indian Law* by Felix S. Cohen (1942). See p. 117.

CONCLUSION

Contrary to the assertion of the government there are really no "different legal and historical principles" (Br. 61) involved here as to the scope of McCarran, whether the claim be for the use of water on Indian or non-Indian federal property. Congress, in dealing with an essential resource, went far beyond particular federal claims such as for farmers, Indian or non-Indian, on reclamation projects or for other uses; or for municipalities for domestic supplies; or for parks; or recreation; or monuments. It dealt with certainty in the use of this resource, and as this Court said in *Eagle* and *Water Division 5*, left no room for exceptions because the totality of claims was included. Accordingly, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 1976

APPENDIX

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 2491

IN THE MATTER OF THE DETERMINATION OF THE RIGHTS TO THE USE OF THE WATERS OF CHILIWIST CREEK AND ITS TRIBUTARIES IN OKANOGAN COUNTY, WASHINGTON, IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 90.03 REVISED CODE OF THE STATE OF WASHINGTON

M. G. WALKER, AS SUPERVISOR OF WATER RESOURCES FOR THE STATE OF WASHINGTON, *Plaintiff*

v.

BILES-COLEMAN LUMBER COMPANY, et al., *Defendants*

Opinion

This is a water rights adjudication case. It was filed in the Superior Court of the State of Washington for Okanogan County under R.C.W. 90.03. The United States and Theophile B. Charley, an Indian allottee, were named as defendants. State process was issued and served.

The United States filed its petition to remove to this Court and has filed a motion to dismiss here. It urges that the Superior Court had no jurisdiction and therefore the case should be dismissed. This is because this Court's jurisdiction is derivative. If the state court had no original jurisdiction this Court on removal has none. Plaintiff moves to remand.

The statute under which the plaintiff claims the right to sue the United States and an Indian allottee is 43 U.S.C.A. 666. It contains the following:

"The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, • • •."

I agree with Judge Christensen in *In Re Green River Drainage Area,* 147 F. Supp. 127 (1956). This statute is a waiver of sovereign immunity in a water rights case. It is my opinion that the motion to remand should be granted. The motion to dismiss may be passed on by the Superior Court. Plaintiff is requested to submit an order so providing.

DONE BY THE COURT this 29 day of May, 1964.

CHARLES L. POWELL
United States District Judge

• • •

EXHIBIT 2

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR OKANOGAN COUNTY

No. 16323

IN THE MATTER OF THE DETERMINATION OF THE RIGHTS TO THE USE OF THE WATERS OF CHILIWIST CREEK AND ITS TRIBUTARIES IN OKANOGAN COUNTY, WASHINGTON, IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 90.03 REVISED CODE OF THE STATE OF WASHINGTON

M. G. WALKER, AS SUPERVISOR OF WATER RESOURCES FOR THE STATE OF WASHINGTON, *Plaintiff*

v.

BILES-COLEMAN LUMBER COMPANY, et al., *Defendants*

Decree

This cause having heretofore come on regularly before the court for hearing on the 18th day of October, 1966 upon the report of the referee, M. G. Walker, plaintiff herein, dated the 19th day of August, 1966, pursuant to notice duly given as required by law, the plaintiff appearing by its attorneys, John J. O'Connell.

• • •

And the parties, excepting the defendant, State of Washington, Department of Natural Resources, having stipulated with plaintiff in open court with regard to modifications of said report that they have withdrawn their exceptions to the report of the referee based on said modifications being made to the referee's report as hereinafter incorporated in this decree, and the court having considered the oral arguments and briefs for and against the exception of the defendant, State of Washington, Department of Natural Resources, and it appearing to the

court from the records and files in this cause that all the defendants have been duly and regularly served, either personally or by publication, with summons in all respects according to law, and the default of the defendants not appearing having been previously ordered by this court, and the court being fully advised in the law and premises:

Now, Therefore, it is by the court Ordered, Adjudged and Decreed:

1. That the exception filed herein by the defendant, State of Washington, Department of Natural Resources, to the report of the referee is sustained and water rights granted to said defendant as set forth in section 5 hereof.

2. That the report of the referee herein is hereby in all things approved and confirmed and adopted, except as in this decree is specifically modified based on stipulations of the parties made in open court, and section 5 hereof.

3. That the party defendants hereto and their successors in interest to the lands after each respective name in the schedule of rights hereinafter set forth be and they are hereby decreed to be entitled to divert the waters of Chiliwist Creek and its tributaries in Okanogan County, Washington, for beneficial use or in connection with their respective lands herein mentioned; that the rights and priorities in and to the use of said water be and they are hereby adjudged and determined to be as set forth in said schedule.

4. That the schedule of rights setting forth the classification and priority for which rights have been established, claimant's name, claim number, number of acres, amount of water, uses, source, point or points of diversion and appurtenant lands are as follows:

A.

Claimant and Number	Number of Acres	Amount of Water Cubic Feet Per Second	Use	Source
CLASS 1—1865				
Theophile B. Charley, et ux				
3	59	0.75	Irrigation stock and domestic	Lower Chiliwist Creek
Point of Diversion:			SE¼SE¼ Sec. 18, T. 32 N., R. 25 E.W.M.	
Appurtenant Lands:			Government Lots 6 and 7, NE¼NE¼ Sec. 19, T. 32 N., R. 25 E.W.M. Government Lots 1 and 2, Sec. 20, T. 32 N., R. 25 E.W.M.	
CLASS 2—1893				
James E. and Gertrude Stout Vern L. and Frances L. Cox Connecticut Mutual Life Insurance Company				
1	55	0.91	Irrigation, stock and domestic	Middle Chiliwist Creek
Point of Diversion:			NE¼NE¼ Sec. 14, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			S½NW¼, NW¼NW¼ Sec. 13, T. 32 N., R. 24 E.W.M. W½W½ Sec. 12, T. 32 N., R. 24 E.W.M.	
Paul and Eula E. Stout				
5	69	1.22	Irrigation, stock and domestic	Middle Chiliwist Creek
Point of Diversion:			NE¼SW¼ and NW¼SE¼ Sec. 13, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			S½NE¼, NE¼SW¼, SE¼ Sec. 13, T. 32 N., R. 24 E.W.M.	

Claimant and Number	Number of Acres	Amount of Water Cubic Feet Per Second	Use	Source
CLASS 3—1900				
PAUL and EULA STOUT				
5	7	0.14	Irrigation, stock and domestic	Middle Chiliwist Creek
Point of Diversion:			SW¼NW¼ Sec. 14, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			S½NW¼ Sec. 14, T. 32 N., R. 24 E.W.M.	
BEULAH LILLIAN HILDERBRAND				
2	—	0.01	Stock and domestic	Upper Chiliwist Creek
Diversion Point:			SW¼SW¼ Sec. 32, T. 33 N., R. 24 E.W.M.	
Appurtenant Lands:			SW¼, W½SE¼, SE¼SE¼ Sec. 32, T. 33 N., R. 24 E.W.M.	
HERBERT L. POOLE and MARILEN D. POOLE ROBERT KERCHEVAL and LUCILLE KERCHEVAL				
7	80	1.60	Irrigation, stock and domestic	Upper Chiliwist Creek
Point of Diversion:			NW¼ Sec. 10, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			NW¼, NW¼NE¼, S½ Sec. 10, T. 32 N., R. 24 E.W.M.; N½ Sec. 15, T. 32 N., R. 24 E.W.M.	
A. E. and ZELMA LOCKWOOD				
6	8	0.16	Irrigation	Spring in NW¼ SW¼ Sec 13, T. 32 N., R. 24 E.W.M.
Point of Diversion:			NW¼SW¼ Sec. 13, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			N½NW¼SW¼ Sec. 13, T. 32 N., R. 24 E.W.M.	

Claimant and Number	Number of Acres	Amount of Water Cubic Feet Per Second	Use	Source
CLASS 4—1905				
LESLIE M. and LOIS MEYERS				
4	7	0.13	Irrigation, domestic and stockwater	Lower Chiliwist Creek
Point of Diversion:			Lot 3, Sec. 17, T. 32 N., R. 25 E.W.M.	
Appurtenant Lands:			Lots 3 and 4, Sec. 17, 32 N., R. 25 E.W.M.; E½SE¼ Sec. 18, T. 32 N., R. 25 E.W.M.	
JAMES E. and GERTRUDE STOUT, ET AL				
1	35	0.59	Irrigation	Middle Chiliwist Creek
Point of Diversion:			NE¼SE¼ Sec. 13, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			Government Lot 4, SW¼SE¼, S½SE¼SW¼ Sec. 18, T. 32 N., R. 25 E.W.M.	
UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE				
10	—	0.01	Stockwater and domestic supply	Upper Chiliwist Creek and tributaries
Points of Diversion:			N½SE¼ Sec. 12, T. 33 N., R. 23 E.W.M.; SE¼SW¼ Sec. 13, T. 33 N., R. 23 E.W.M. NE¼NE¼ Sec. 24, T. 33 N., R. 23 E.W.M.	
Appurtenant Lands:			NE¼SW¼, SE¼ Sec. 12; all of Sec. 13; SE½NE¼ Sec. 14; NE¼ Sec. 23; all of Sec. 24; E½ Sec. 25; E½ Sec. 36 all in T. 33 N., R. 23 E.W.M., E½ Sec. 1, T. 32 N., R. 23 E.W.M., W½ Sec. 30; W½ Sec. 31 all in T. 33 N., R. 24 E.W.M.	

Claimant and Number	Number of Acres	Amount of Water Cubic Feet Per Second	Use	Source
WILLIAM H. and ELINOR L. HARMS GEORGE E. and EVELYN HARMS				
14	—	0.01	Stockwater and domestic supply	Upper Chiliwist Creek
Point of Diversion:			At southeast corner of the SE¼, Sec. 4, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			South 60 rods of S½SW¼ Sec. 4; NW¼, SE¼, SE¼SW¼ Sec. 9; all that part of W¼ Sec. 10 lying west of county road; all in T. 32 N., R. 24 E.W.M.	
CLASS 5—1906				
JAMES E. and GERTRUDE STOUT, ET AL				
1	60	1.0	Irrigation and stockwater	Sullivan Creek
Point of Diversion:			SE¼NW¼ Sec. 3, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			SE¼NW¼ and E½SW¼ Sec. 3, T. 32 N., R. 24 E.W.M.	

This right is not subject to the prior rights of classes 1 through 4 hereof on the main stem of Chiliwist Creek below the confluence of Sullivan Creek and the main stem at such times as Sullivan Creek does not contribute surface waters naturally to the flow of Chiliwist Creek.

N. M. and KATE W. DELFELD DONALD W. and BILLIE L. DELFELD				
11	—	0.01	Stockwater and domestic supply	Frazier Canyon Creek and Smith Canyon Creek
Point of Diversion:			SW¼SW¼ Sec. 35, T. 33 N., R. 24 E.W.M.	
Appurtenant Lands:			Government Lot 4, S½NW¼, SW¼ Sec. 1; N½, N½SW¼ Sec. 2; Government Lot 1, SE¼NE¼, NE¼SE¼ Sec. 3; all in T. 32 N., R. 24 E.W.M. SW¼SW¼ Sec. 26; SE¼SE¼, East ¾ SW¼SE¼ Sec. 34; Sec. 35; all in T. 33 N., R. 24 E.W.M.	

Claimant and Number	Number of Acres	Amount of Water Cubic Feet Per Second	Use	Source
CLASS 6—1914				
A. E. and ZELMA LOCKWOOD				
6	3	0.035	Irrigation, stockwater, domestic	Springs tributary to Middle Chiliwist Creek
Point of Diversion:			SE¼NE¼ Sec. 14, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			SE¼NE¼, NE¼SE¼ Sec. 14, T. 32 N., R. 24 E.W.M.	

Note: By virtue of Decree, Cause No. 8897 of this Court, this right is superior to the Class 2 right of Claim No. 1, James E. Stout, et al.

CLASS 7—1917				
CHILIWIST CATTLEMEN'S ASSOCIATION				
12	—	0.01	Stockwater	Springs tributary to Frazier Canyon Creek
Point of Diversion:			NE¼ Sec. 34, T. 33 N., R. 24 E.W.M.	
Appurtenant Lands:			NE¼ Sec. 34, T. 33 N., R. 24 E.W.M.; SW¼NE¼, NW¼SE¼ Sec. 33, T. 33 N., R. 24 E.W.M.	
CLASS 8—1953				
JAMES E. STOUT, ET AL				
1	82	2.0	Irrigation	Sullivan Creek
Point of Diversion:			SE¼NE¼ Sec. 33, T. 33 N., R. 24 E.W.M.	
Appurtenant Lands:			E½SW¼, SE¼NW¼ Sec. 3, T. 32 N., R. 24 E.W.M.; NW¼SW¼ Sec. 34, T. 33 N., R. 24 E.W.M.; NE¼SE¼, E½NE¼ Sec. 33, T. 33 N., 24 E.W.M.	

Note: This right by virtue of water right Certificate No. 6156 and partially supplements claimant's right under Class 5. Diversion is limited to months of March through June and is subject to the provision that sufficient water be bypassed to satisfy downstream riparian owners with stockwater.

Claimant and Number	Number of Acres	Amount of Water Cubic Feet Per Second	Use	Source
		CLASS 9—1955		
JAMES E. STOUT, ET AL				
1	118	2.10	Irrigation	Smith Canyon and Middle Chiliwist Creeks
Points of Diversion:			NE¼NE¼ Sec. 14, T. 32 N., R. 24 E.W.M. and NE¼SE¼ Sec. 13, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			N½NE¼, SE¼NE¼, NE¼SE¼ Sec. 11, T. 32 N., R. 24 E.W.M.; W½SW¼, SW¼NW¼ Sec. 12, T. 32 N., R. 24 E.W.M.; S½NW¼, NW¼NW¼ Sec. 13, T. 32 N., R. 24 E.W.M.; Government Lot 4, SW¼SE¼, S½SE¼SW¼ Sec. 18, T. 32 N., R. 25 E.W.M.; Government Lot 1, NW¼NE¼, NE¼NW¼ Sec. 19, T. 32 N., R. 25 E.W.M.	
Note: This right by virtue of water right Certificate No. 7147 which supplements earlier class rights for Claimant No. 1.				
PAUL and EULA E. STOUT				
5	91	1.62	Irrigation	Middle Chiliwist Creek
Points of Diversion:			NE¼SW¼ and NW¼SE¼ Sec. 13, T. 32 N., R. 24 E.W.M.; SW¼NW¼ Sec. 14, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			S½NE¼ NE¼SW¼, SE¼ Sec. 13, T. 32 N., R. 24 E.W.M.; S½NW¼ Sec. 14, T. 32 N., R. 24 E.W.M.	
Note: This right by virtue of water right Certificate No. 6733 and supplements Claimants' Class 2 and 3 rights as well as to include 22 additional acres of land not previously irrigated.				

B. Claimant Number 10, United States of America, as the owner of the lands of the Okanogan National Forest, has submitted claims for water rights and proof related thereto based on two sources: (1) Rights based on the law of the State of Washington and (2) Rights "reserved" by the United States of America for use in relation to lands within the Chiliwist Creek drainage of the Okanogan National Forest. See generally *Winters* v. *United States,* 207 U.S. 564 (1908) and *Arizona* v. *California,* 373 U.S. 546 (1963).

With regard to rights established under the law of the State of Washington, the claimant is entitled to 0.01 cubic foot per second for stockwater and domestic purposes with a priority date of 1905, as set forth in the schedule of this report.

As to the so-called "reserved" rights, the claimant, based on the scope of the forest reservation as set forth in the Proclamations of the President of the United States establishing the Okanogan National Forest, and taking into account the quality of the soils, the natural flora and fauna and the topography of the lands in question, the climatic conditions, and past and present uses of the lands, is entitled with a priority date of 1897 to make use of the waters of Chiliwist Creek now and in the future in amounts reasonably necessary and sufficient to carry out the limited purposes for which the forest reserve lands were reserved; namely, timber management and production and related purposes including fish and wildlife management, livestock grazing, and recreational activities.

C. When the supply of water for irrigation purposes is insufficient to fill any right in the foregoing schedule from April 1 to October 1, the owner of such right is entitled to divert water in the order of his priority at the rate of 1 cubic foot per second for each 60 acres at any time it is available after all scheduled rights are filled, to the extent of a volume of 4 acre-feet per acre per year.

D. Irrigation from April 1 to October 1 shall not exceed 1.0 cubic foot per second for each 60 acres and shall not exceed a total of 4 acre-feet per acre will be diverted for the same period.

E. This allotment of water is subject to a rotation schedule fixed by the Supervisor or by the water master for the districts involved, when it is deemed advisable to rotate the use of water in order to obtain a greater benefit from the available supply.

F. When the flow from Chiliwist Creek and its tributaries is insufficient to supply all classes, rights of a higher class shall be fully satisfied before water is given to those of a subordinate class, and in case of failure of the supply of water to completely satisfy the total amount awarded to a given class, the amount remaining for said class shall be apportioned to the appropriators in said class in the proportion which the number of cubic feet per second awarded to each person bears to the total number of cubic feet per second awarded such class, subject to use by rotation. A superior right does not run against inferior rights on other tributaries that enter the stream below the point of diversion of said superior right. Any person taking water from Chiliwist Creek and its tributaries, shall provide and maintain at his own expense proper diversion works and measuring devices as are required by statute under RCW 90.03.360.

G. Subject to the rights set forth in this decree, all waters of Chiliwist Creek and its tributaries are subject to appropriation by the public, or reservation by the United States.

5. That the Department of Natural Resources, State of Washington, defendant herein, as owner of lands riparian to Chiliwist Creek is entitled, with a priority date as hereinafter set forth, to a continued right of flow in said stream in the amount of 0.025 cubic feet per second for stock water

watering purposes for livestock utilizing for pasture the following described lands:

* * *

6. That the clerk of the above-entitled court be and is hereby directed to transmit to the plaintiff, Supervisor of Water Resources, a certified copy of this decree.

7. That upon receipt of such certified copy, the plaintiff, Supervisor of Water Resources, shall prepare and file with the clerk of the above-entitled court a statement by him in this determination, showing the total expense by him in his determination, and apportioning such expense to the various rights as determined by the court in this decree in proportion to the amount of such rights provided that no costs or expenses shall be assessed to the United States of America or Theophile B. Charley, et ux.

8. That the plaintiff, Supervisor of Water Resources, is hereby directed to issue to the persons entitled thereto certification of water in accordance with the provisions of this decree, as provided in RCW 90.03.240, provided said persons shall have first paid the amount of expenses apportioned against their lands as provided in section 7 of this decree.

Done in open court this 16th day of May, 1967.

* * *

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 75-199M Civil

STATE OF NEW MEXICO, ex rel.,
S. E. REYNOLDS, State Engineer, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, et al., *Defendants*.

Order

This case involves a New Mexico adjudication of water rights to which the United States was joined as a defendant to establish its claims on behalf of various federal agencies and as trustee over Indian lands using or claiming water of the San Juan River.

The United States removed the case here and the plaintiff moved to remand the action to the District Court for San Juan County. The motion to remand is well taken.

The United States was properly before the State Court pursuant to 43 U.S.C. 666 in its capacity as trustee over Indian lands, *Arizona* v. *California*, 373 US 546; *United States* v. *Akin*, 504 F.2d 115 (10th Cir. 1974) (where the United States brought the action as Plaintiff on behalf of two Indian tribes); and *United States* v. *District Court for Eagle County*, 1101 US 520. The right of removal which the United States seeks to exercise is not implicit in 43 U.S.C. 666, nor in the mere fact that the United States is a defendant.

There is presently no federal question jurisdiction and the removal cannot be sustained under 1441(c). Section 1442 also is not available. *In re Green River Drainage*

Area, 147 F.Supp. 127 (DC Utah 1956); *Andersen* v. *Bingham & G. Ry. Co.*, 169 F.2d (10th Cir. 1948). Now, Therefore,

IT IS ORDERED that the action is remanded to the District Court for San Juan County, New Mexico.

EDWIN L. MECHEM
United States District Judge

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

Supreme Court, U.S.
FILED
AUG 1 1975
MICHAEL RODAK, JR., CLERK

No. 74-940
COLORADO RIVER WATER CONSERVATION DISTRICT,
ET AL., Petitioners
v.
UNITED STATES OF AMERICA, Respondent

No. 74-949
MARY AKIN, ET AL., Petitioners
v.
UNITED STATES OF AMERICA, Respondent

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-940
COLORADO RIVER WATER CONSERVATION DISTRICT,
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UNITED STATES OF AMERICA, Respondent

No. 74-949
MARY AKIN, ET AL., Petitioners
v.
UNITED STATES OF AMERICA, Respondent

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

I. INTEREST OF AMICI CURIAE

The States named herein as amici curiae fear the disruption of their respective systems for the determination and administration of water rights as a result of the decision of the court of appeals in this case. Unless the pragmatic and sagacious decision of the district court to abstain is reinstituted, the historically proven special capabilities of the water rights systems of amici curiae may also be undermined by the interference of a separate and potentially antagonistic federal process. The cardinal importance of water in the arid and semi-arid western states compels amici curiae to urge this Court to reject the injudicious opinion of the court below and thus preserve the proven effectiveness of the unitary state systems.

Amici curiae also appear to request this Court to recognize the appropriateness of comity and abstention to this case, and thereby sustain these essential doctrines of a workable federalism.[1]

II. JURISDICTION

The judgment of the United States Court of Appeals for the 10th Circuit was entered on October 2, 1974. On November 12, 1974, a timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied. Petitions for Writ of Certiorari were filed on January 30, 1975 and February 1, 1975, and were granted on April 28, 1975. This Court's jurisdiction is invoked pursuant to 28 U. S. C. §1254(1).

III. QUESTION PRESENTED

Should a federal district court defer on the basis of comity and abstention to a competent state forum for the resolution of federal water rights claims which are capable of complete determination and administration in the state system?

IV. STATUTORY PROVISIONS INVOLVED

43 U. S. C. §666, 66 Stat. 560, commonly referred to as the McCarran Amendment, reads as follows:

> §666. *Suits for the adjudication of water rights–Joinder of the United States as defendant; costs*
>
> (a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such

[1] Since the reserved water rights theory has no application in the State of Texas, it joins this brief for the sole purpose of upholding the doctrines of abstention and comity.

> rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.
>
> *Service of Summons*
>
> (b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.
>
> *Joinder in suits involving use of interstate streams by State*
>
> (c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. July 10, 1952, c. 651, Title II, §208 (a)-(c), 66 Stat. 560.

Also involved is the Colorado Water Right Determination and Administration Act of 1969, Colorado Revised Statutes 1973, 37-92-101, *et seq.*, as amended, and to the extent of the amici curiae's interest, the water right de-

termination and administration statutes of each of the individual states are relevant.

V. SUMMARY OF ARGUMENT

The determination and administration of water rights, including federal water rights, has been a well-performed, historical function of the states. Comity requires that the federal government respect the rightful independence of such state functions. Unless the complaint of the United States is dismissed, the federal court will be needlessly interfering with the established integrity and utility of a state regulatory scheme.

Abstention is a judicial tool by which federalism may be enhanced. In this case the district court, taking a pragmatic approach, sought to advance federalism and repair the parties to an on-going state proceeding. The district court wisely avoided piecemeal, duplicative and potentially chaotic adjudication and administration of the use of a natural resource of utmost state concern and involving established rights which are enmeshed in an effective and comprehensive state regulatory system. The declination of jurisdiction is consistent with the Congressional intent expressed in the McCarran Amendment and with the holdings of this Court in *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520 (1971) and *United States* v. *District Court in and for Water Division No. 5*, 401 U.S. 527 (1971). Abstention is clearly the proper course of action.

VI. ARGUMENT

A. RESPECT FOR THE HISTORIC FUNCTIONS OF STATES IN WATER RIGHT DETERMINATION AND ADMINISTRATION NECESSITATES THE APPLICATION OF THE DOCTRINE OF COMITY TO DISMISS THE FEDERAL GOVERNMENT'S ACTION.

Comity provides the ideal vehicle for transporting the water rights claims of the United States from a federal court to a state proceeding. The doctrine was well described as follows:

> "The word "comity" identifies the concept that federal courts, in the exercise of their jurisdiction, should give consideration to the sovereign status of the individual state. Commonly referred to as a "doctrine," comity is more a policy consideration than a rule of law. That policy consideration, however, underlies the rule established by the Supreme Court that federal courts should abstain to avoid needless conflict of federal jurisdiction with the administration by a state of its own affairs. *See* Wright, Federal Courts, § 52 (1970). A sound conception of our federal system requires a federal court to withhold intervention with state procedure in the interest of maintaining harmony within the system. State of California v. Oroville-Wyandotte Irr. Dist., 409 F.2d 532 (9th Cir. 1969)."
>
> *Dresser Industries, Inc. v. Insurance Co. of No. America*, 358 F.Supp. 327, 329 (1973), aff'd. mem., 475 F.2d 1402 (5th Cir. 1973).

Comity was vigorously asserted by Mr. Justice Black for the Court in *Younger* v. *Harris*, 401 U.S. 37, 44 (1971):

> " . . . the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in

their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism", and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.'"

Directly applicable to the instant case, wherein the United States seeks federal court jurisdiction because federal water claims are involved, is the statement from *Younger* (at 44) that:

> " . . . the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

Both of these statements were given prominence in *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975) wherein the Court declared:

> "The seriousness of federal judicial interference with state civil functions has long been recognized by this Court." (at 602)
>
> ***
>
> "The component of Younger which rests upon the threat to our federal system is thus applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding." (at 603)

While *Younger* presents an abstention doctrine parallel to that urged herein, it forcefully sets forth the identical considerations of comity which are a fundamental basis

upon which the federal complaint should be dismissed. The court of appeals not only showed no sensitivity to the legitimate interest of the state, as *Younger* instructs, but totally ignored the doctrine of comity, other than to recognize it as a basis for the district court's dismissal of the suit.

Colorado and amici curiae have developed individual water right determination and administration systems. Most of these have been designed and refined over decades of experience to meet the hydrological conditions, economic and social characteristics, and special concerns of each state. All of them reflect the longstanding concern of state government in the West with the fair and efficient regulation of rights to the use of water. Citizens, governmental units, and private enterprise have all relied upon the efficiency and integrity of these systems.

In contrast, the federal government has no system and, in fact, has wisely and commonly deferred to state law and state forums in most water right matters.

> "Congress has followed a consistent policy of adherence to state law with regard to the acquisition and administration of water rights by the federal government."
>
> *In re Green River Drainage Area,* 147 F.Supp. 127, 145 (D. Utah, 1956). See also the numerous supporting citations at 145-46.

While *Arizona* v. *California,* 373 U.S. 546 (1963), has subsequently recognized certain independent federal water rights, neither Congress nor the courts have departed from their long-standing recognition that state forums can competently adjudicate the "whole community of claims in-

volved" including reserved right claims and have continued the deference to state processes. *United States* v. *District Court in and for the County of Eagle,* 401 U.S. 520, 525 (1971); *United States* v. *District Court in and for Water Division No. 5.*, 401 U.S. 527 (1971).

Here, the United States may present its claims in the ongoing adjudicatory proceeding in Water Division 7, which already has jurisdiction over numerous federal claims for appropriative and reserved water rights in the geographic area. The Water Division 7 proceeding now includes the United States pursuant to joinder under the McCarran Amendment, 43 U. S. C. §666.[2] The joinder of the United States in a state water rights proceeding assures that all the relevant parties will be before the court and therefore the utility of the state function will be enhanced. The comprehensive and orderly determination of water rights in a common source of supply is integral to the entire fabric of life in the western states. In fact, the effectiveness of some of the water rights systems of amici curiae will be totally undermined if the United States can circumvent the McCarran Amendment by rushing its claims into federal court. Thus, by facilitating a complete, unitary water adjudication, the McCarran Amendment furthers comity.

Through the McCarran Amendment, which also authorizes the joinder of the federal government for the *administration* of water rights, Congress stated an intent that the state systems of water right determination and

[2] After being served under the McCarran Amendment, the United States filed its claims to waters in the Dolores River drainage within Water Division No. 7 in the state forum, but omitted all claims it had asserted in federal court. Claims to waters in the San Juan National Forest are divided between the state and federal courts, the exact type of piecemeal adjudication with potentially differing results, which should be avoided by abstention.

administration should be utilized for all aspects of federal water claims. Just a few years ago, this Court unanimously held that reserved right claims could be adequately abjudicated in a state forum. *United States* v. *District Court in and for the County of Eagle,* 401 U.S. 520 (1971); *United States* v. *District Court in and for Water Division No. 5,* 401 U.S. 527 (1971). By avoiding the adverse consequences of a bifurcated adjudicative and administrative process sought by the federal government in those suits, this Court implicitly recognized and advanced the policy of comity. The assumption of jurisdiction by the federal court would be a severe retrogression from *Eagle County* and *Water Division 5,* would encourage circumvention of the McCarran Amendment, and would debase the doctrine of comity.

Federal courts can best promote comity by deferring to the state water rights systems in cases such as the one at bar. Any other decision would "trivialize" the "principles of equity, comity, and federalism." *Hicks* v. *Miranda,* 422 U.S. _____, 43 U.S.L.W. 4857, 4863 (1975) (Burger, C. J., concurring).

B. FEDERALISM WILL BE PROMOTED BY THE EXERCISE OF ABSTENTION TO DISMISS THIS COMPLAINT.

State courts as well as federal courts properly engage in the adjudication and protection of federal claims. Abstention, a doctrine rooted in this cooperative judicial enterprise, allows a federal court to decline jurisdiction and send the parties to a state forum for resolution of their controversy. *Railroad Commission of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941). The opinion of the court of appeals ignores the clearly analogous decisions of this

Court and vitiates the beneficial role of abstention in promoting federalism, judicial economy, and the efficient resolution of claims such as those advanced by the Government.

The "policy of comity inherent in the doctrine of abstention"[3] and the concern for the advancement of federalism permeate the decisions on abstention from this Court:

> "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with the proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments should at all times actuate the federal courts,' *Matthews* v. *Rodgers*, 284 U.S. 521, 525 as their 'contribution . . . in furthering the harmonious relation between state and federal authority' . . . *Railroad Comm.* v. *Pullman Co.*, 312 U.S. 496, 501."
>
> *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 176 (1959).

To aid a district court in determining whether federalism will be promoted by deference to a state proceeding, numerous "models" have been set forth by the Supreme Court of the United States.

Of foremost applicability here, is the case of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), wherein abstention was ordered by the Supreme Court on the basis of several

[3] *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 177 (1959).

interrelated factors: 1) the long standing interest and economic importance to the state of the natural resources at issue; 2) the efficiency and expertise of the state forum in dealing with a politically sensitive and technically difficult legal issue in contrast to the inexperience of the federal courts; and 3) avoidance of needless conflict between federal courts and a comprehensive state regulatory system. The Court concluded (at 334):

> "Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand."

The benefits of the *Burford*-type abstention are great. The federal courts are not burdened with duplicative, protracted and difficult litigation. The state is permitted to continue operation of its regulatory program without interference by the federal district court, and may first tackle the novel questions affecting it. The litigants receive the best forum without significant delay or inconvenience and any rights adjudicated are easily incorporated within the state administrative scheme. And, of paramount importance, federalism is respected and advanced by furthering a cooperative relationship between the sovereign state and the national government.[4]

Following the precedent of *Burford*, abstention has been prudently applied to situations remarkably similar to that presently before the Court. The subject matter of this litigation is water, a resource of immense importance and unique concern to Colorado and amici curiae. Where a natural resource is of such stature, the state forum should be given the primary opportunity to decide fundamental

[4] "*Burford* abstention, properly applied, seems to benefit everyone and prejudice the legitimate interests of no one." Bezanson, "Abstention: The Supreme Court and Allocation of Judicial Power,". 27. *Vand. L. Rev.* 1106, 1127 (1974).

questions integral to the use and regulation of that resource. *Railroad Commission of Texas* v. *Rowan and Nichols Oil Co.*, 311 U.S. 570 (1941). *Reetz* v. *Bozanich*, 397 U.S. 82 (1970). The appropriateness of abstention in cases involving the vital resource of water has previously been recognized by this Court.[5]

Colorado and amici curiae have all adopted sophisticated and comprehensive schemes for the determination and administration of water rights which have been relied upon by their citizens. Since water rights are interdependent, any rights of the United States will directly affect all the other rights which have been granted pursuant to state law in a common source of supply.[6]

Therefore, the federal claims are undeniably entangled in a scheme of state regulation. Solicitous forbearance from intrusion into the arena of the state regulatory scheme calls for the exercise of abstention. *Alabama Public Service Commission* v. *Southern Railroad Co.*, 341 U.S. 341 (1950); *Alleghany Airlines* v. *Pennsylvania Public Utilities*

[5] "The Court of Appeals erred in refusing to stay its hand. The state law issue which is crucial in this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources." *Kaiser Steel Corp.* v. *W.S. Ranch Co.*, 391 U.S. 593, 594 (1968). The concurring opinion of Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Marshall joined, also emphasizes this point. See also, *Union Water Supply Corp. of Garciasville* v. *Vaughn*, 355 F.Supp. 211 (S.D. Tex. 1972), aff'd per curium 474 F.2d 1396 (5th Cir. 1973).

[6] The *inter sese* nature of appropriative rights calls for a single, all-embracing process of determination and administration. The numerous practical, as well as technical problems, ingerent in a bifercated process, such as uncertainty of rights, relative powers of state and federal water administrators, and day-to-day stream management have been previously brought to the attention of the Court. The need for a unitary system which can deal with the "whole community of claims" is well recognized. *Pacific Live Stock Co.* v. *Oregon Water Board*, 241 U.S. 440 (1916); *El Paso & R. I. Ry. Co.* v. *District Court*, 36 N.M. 94, 8 P.2d 1064 (1932).

Commission, 465 F.2d 237 (3rd Cir. 1972) cert. denied, 410 U.S. 943 (1973).

State forums can competently determine all federal reserved rights. *United States* v. *District Court in and for the County of Eagle, State of Colorado*, et al., 401 U.S. 520 (1971); *United States* v. *District Court in and for Water Division No. 5, State of Colorado*, 401 U.S. 527 (1971). Pursuant to these decisions, the United States is adjudicating its reserved rights claims in Colorado's state courts in Water Divisions 4, 5, 6, and 7, and former Water Districts 36, 37, 51 and 52, and has adjudicated similar claims in state forums of various amici curiae. See, *Avondale Irrigation District* v. *North Idaho Properties, Inc.*, 96 Idaho 1, 523 P.2d 818 (1974).[7] The on-going proceeding in Colorado's Water Division 7 stands ready to adjudicate all the claims presented to the federal court in Denver as well as the federal claims already before it. The avoidance of piecemeal determination and potentially conflicting results and administration, concern for sound judicial management, and the existence of a pending state proceeding make abstention particularly appropriate.

[7] The United States is also presently adjudicating its water claims in New Mexico's state courts. *Mimbres Valley Irrigation Co.* v. *Salopek, et al., State of New Mexico ex rel. Reynolds* (Plaintiff in Intervention) v. *Abraham, et al.*, Luna County District Court, No. 6326 (Mimbres River Adjudication wherein the United States was joined under the McCarran Amendment); *State of New Mexico ex rel. Reynolds* v. *L. T. Louis, et al.*; *State of New Mexico ex rel. Reynolds* v. *Hagerman Canal Co., et al.* Chaves County District Court, Nos. 20294, 22600 (consolidated) (Adjudication of underground waters in the Roswell Basin, wherein the United States was joined under the McCarran Amendment. Similar suits have been adjudicated in the state courts in Washington.

As the Brief for the United States in Opposition to the Petitions for Certiorare states (at 9), New Mexico has instituted certain water rights suits involving federal claims in federal courts. Federal jurisdiction was invoked as a practical solution to avoid the time-consuming procedural litigation which would have ensued had the Government been joined under the McCarran Amendment to adjudicate its claims on behalf of Indians in state court. Expeditious adjudication was of paramount importance in order that the construction of major water resource projects not be delayed.

The opinion of the court of appeals reflects an overly technical analysis of abstention - one which appears sterile and detached when contrasted with the pragmatic reasoning of the district court. The viewpoint of ironclad federal jurisdiction adopted by the court of appeals in inappropriate when considering abstention, "a deeper policy derived from our federalism", *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25, 29 (1958). When so many of the circumstances which promote federalism exist, abstention should be exercised.

CONCLUSION

"Our Federalism", articulated in *Younger* v. *Harris*, is not a hollow phrase resigned to idealistic oration. Rather, it is a fundamental concept to be given vitality through the doctrines of comity and abstention. A host of material factors call for the advancement of "Our Federalism" by the dismissal of the federal court action and the concomitant utilization of the state forum. The capable water right determination and administration systems of the states should not be frustrated by the interference of the federal courts. This Court should reverse the court of appeals and reinstate the decision of the district court to abstain.

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Supreme Court, U. S.
FILED
SEP 10 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-940

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL.,
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v.

UNITED STATES OF AMERICA,
Respondent.

No. 74-949

MARY AKIN, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF AMICI CURIAE, NATIONAL CONGRESS OF AMERICAN INDIANS, INC., CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, CROW TRIBE OF MONTANA, HOOPA VALLEY TRIBE OF CALIFORNIA, QUINAULT TRIBE OF WASHINGTON, SHOSHONE AND ARAPAHOE TRIBES OF THE WIND RIVER RESERVATION, WYOMING, THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, NORTH DAKOTA

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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SHOSHONE AND ARAPAHOE TRIBES OF THE
WIND RIVER RESERVATION, WYOMING,
THREE AFFILIATED TRIBES OF THE FORT
BERTHOLD RESERVATION, NORTH DAKOTA**

I. STATEMENT OF INTEREST

This brief is filed with the written consent of all parties.

Amicus curiae the National Congress of American Indians, Inc. (NCAI), a nonprofit association of most of the Indian tribes in this country, was formed to promote the interests of American Indians. NCAI was incorporated in Oklahoma in 1954, and now has national headquarters at 1430 K Street, N.W., Washington, D.C.

The other amici named are organized, self-governing Indian tribes, recognized as such by the Secretary of the Interior. Each has water rights which will be affected by the decision of this Court in the instant cases.

Your amici support the position of the United States, particularly as it represents as trustee the Ute Mountain Ute and Southern Ute Indian Tribes, and urge that the Court affirm the decision below, thereby permitting the United States District Court to adjudicate the Indian water rights involved in these cases.

II. INDIAN WATER RIGHTS ARE PRIVATE PROPERTY RIGHTS, HELD BY THE UNITED STATES IN TRUST FOR THE INDIANS, AND CONGRESS HAS MADE NO PROVISION IN THE McCARRAN AMENDMENT, 43 U.S.C. § 666, FOR ADJUDICATION OF THOSE RIGHTS IN STATE COURTS.

Petitioners would read the McCarran Amendment, 43 U.S.C. § 666, as conferring upon the state courts exclusive jurisdiction to adjudicate not only all federal proprietary water rights, but all Indian water rights held in trust by the United States.

The statute simply does not express that intention. In fact, it does not even mention Indian water rights. The McCarran Amendment merely waives the sovereign immunity of the federal government from suit in state court adjudications of water rights *owned* by the United States. Without greater specificity, the waiver refers only to proprietary rights of the United States held for its own use, such as on military installations, national parks, and public lands,[1] and not to the unique legal arrangement whereby the federal government holds only legal title to private property, including water rights, in trust for the beneficial use of Indians and Indian tribes.[2]

This Court has never blurred the distinction between Indian property and federal property. The Court has recognized that when Indian reservations were established, the United States did not grant to the Indian tribes their property rights in the reservations, but rather the tribes simply retained all those rights they had held, often from time immemorial. *United States* v. *Winans*, 198 U.S. 371, 381 (1905). The Court long ago confirmed that among the property rights retained were water rights, without which, all else the Indians hold would be valueless. *Winters* v. *United States*, 207 U.S. 564, 576 (1908).

Protection and adjudication of Indian property are placed by the United States Constitution exclusively within federal jurisdiction, *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 670 (1974), and do not become

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[1] Congress is empowered to make all necessary regulations for the property of the United States. United States Constitution, Art. IV, sec. 3, cl. [2]. But that power does not relate at all to its responsibility, as trustee, to protect property which the United States holds in trust for an Indian tribe.

[2] Nothing in *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520 (1971), holds to the contrary. That case stands only for the proposition that federal reserved rights are subject to the provisions of the McCarran Amendment. Any reference to Indian water rights therein is not controlling here, because that case was concerned only with the federal reserved proprietary water rights to a national forest and other federal areas. The distinction between Indian water rights and federal rights was not addressed.

subject to state authority "except by virtue of express authority conferred upon the State by act of Congress." *McClanahan* v. *Arizona State Tax Comm'n.*, 411 U.S. 164, 171 (1973).[3]

The constitutional underpinning for such federal authority is today more than justified by the "great hesitancy" and "traditional fear" Indians have in subjecting themselves to state tribunals. S. REP. NO. 1507, 89th Cong., 2d Sess. 2 (1966). A former Solicitor of the Department of the Interior has stated:

> "If history teaches us anything, it teaches us that Indian claims, particularly those encompassed within the category of 'reserved water rights,' are not going to receive a cordial reception from state engineers and state courts. Nothing but mischief can come from suggestions that Indian rights should be quantified and recorded in conformity with state proceedings for the adjudication of water rights. . . ."[4]

The special nature of Indian property and the federal basis of its protection make it clear that if the McCarran Amendment had been intended to eliminate federal court jurisdiction to adjudicate Indian water rights, Congress

[3] As stated, the McCarran Amendment does not expressly embrace the private water rights of Indians. The legislative history of the statute, some of which is cited in Petitioners' Brief, p. 25, n. 13, is at best ambiguous on the question. Even the author of the legislation was uncertain whether the measure would cover Indian rights. 97 Cong. Rec. 12948 (1951) (exchange between Senators McCarran and Chavez).

[4] Letter from Hon. Edward Weinberg, December 15, 1971, quoted in 74 COLUM. L. REV. 1299, 1309 n.66 (1974). Mr. Weinberg further commented that it was unrealistic ". . . [t]o assume that the Court will exercise its certiorari power to the extent necessary to provide an effective ongoing appellate remedy." *Id.* at 1310 n.67. *See also, Water Policies of the Future*, Final Report to the President and the Congress of the United States by the National Water Commission, at 478-79 (1973).

would have expressly so provided. *McClanahan* v. *Arizona State Tax Comm'n., supra.* Congress did not do so, either there or in any other legislation. In fact, one year after passing the McCarran Amendment, Congress reaffirmed that the determination of Indian water rights was within exclusive federal jurisdiction when it enacted Public Law 280, the Act of August 15, 1953, 67 Stat. 588. That statute authorized partial assumption of state jurisdiction over Indian reservations in civil causes of action and criminal cases, but section 4, 67 Stat. 589, 28 U.S.C. 1360(b), specifically withheld from the states any authority over

> "alienation, encumbrance, or taxation of any real or personal property, *including water rights*, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States . . ." (emphasis added)

and withheld jurisdiction from state courts "to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein." *Id.*

Read *in pari materia*[5] with section 4 of Public Law 280, the McCarran Amendment plainly does not oust Indian water rights from the exclusive jurisdiction of the federal courts.

[5] *See, Menominee Tribe* v. *United States*, 391 U.S. 404, 410-11 (1968), where the Court read the Menominee Termination Act, 25 U.S.C. §§ 891-902, *in pari materia* with Public Law 280 and thereby concluded that that Tribe's hunting and fishing rights were not taken by the former Act.

III. CONCLUSION

The decision of the United States Court of Appeals for the Tenth Circuit in the instant cases should be affirmed.

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12701-10-75

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-940

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

No. 74-949

MARY AKIN, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF AMICI CURIAE, SOUTHERN UTE INDIAN TRIBE, ET AL.

STATEMENT OF INTEREST

By letter to the Clerk of the Supreme Court, dated September 15, 1975, the petitioners have given their written consent to the filing of this brief. The Solicitor General has also given his consent on behalf of the United States.

Amici Curiae Southern Ute Indian Tribe and Ute Mountain Ute Indian Tribe are the equitable or beneficial owners of the water rights appurtenant to the Southern Ute and Ute Mountain Ute Indian Reservations in Colorado which the United States

seeks to adjudicate in this action. Both of these *amici* intend to intervene and participate in the trial of this case on remand. They did not have an opportunity to intervene prior to the district court's dismissal. However, they appeared as *amici curiae* in the district court to urge reconsideration of the dismissal order and filed a brief *amici curiae* in the court of appeals urging that the district court's decision be reversed.

The other *amici,* except for the National Tribal Chairmen's Association, are organized, self-governing Indian tribes. recognized as such by the Secretary of the Interior. All of them are located within the states that have filed briefs *amici curiae* in support of the petitioners. All of them have water rights which stand to be affected by the outcome of these cases.

The National Tribal Chairmen's Association is an unincorporated, non-profit organization of all duly constituted chairmen, presidents, governors and chiefs of federally recognized Indian tribes, and the presidents of the twelve Alaska Regional Corporations established under the Alaska Native Claims Settlement Act. The Association and all of its members are vitally interested in preserving and protecting the water rights of Indian tribes and in maintaining exclusive federal and tribal jurisdiction over Indians and Indian lands except where state jurisdiction has been specifically authorized by Congress. The water rights of the Indian tribes located in Colorado, the Southern Ute and Ute Mountain Ute, are at issue in this litigation.

Tribal and individual Indians' rights to the use of water, like rights to the lands which constitute their reservations, are recognized and protected by

treaties, statutes, and agreements entered into with the federal government. The landmark case of *Winters* v. *United States,* 207 U.S. 564 (1908), held that the right to the use of water for the benefit of the Fort Belknap Indian Reservation was impliedly reserved in the treaties and agreements creating that reservation. Protecting these rights to the use of water is absolutely critical to the continued existence and development of all Indian reservations, for without the use of water they are barely inhabitable, and their residents are almost certainly doomed to perpetual impoverishment. Indian water rights are akin to the fishing rights considered by the United States Supreme Court in *United States* v. *Winans,* 198 U.S. 371, 381 (1905); they are "not much less necessary to the existence of the Indians than the atmosphere they breathe."

These *amici,* hereafter referred to as "the Indian *amici,*" steadfastly oppose the adjudication of their precious water and other property rights in state courts. To the best of their knowledge, the federal district court's dismissal of this action in favor of the state court proceeding is unprecedented. All previous adjudications of Indian water rights have taken place in federal forums without any apparent adverse affects on the states and their water adjudication systems. The district court's disposition threatens to alter, drastically and disastrously, the historical relationship that has developed between the federal government and the Nation's Indian tribes. That relationship leaves little or no room for the states and their courts. *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685 (1965); *Williams* v. *Lee,* 358 U.S. 217 (1959).

For these reasons, the Indian *amici* support the position of the United States and urge that the decision of the court of appeals be affirmed. They will confine most of their argument to the vital issues of federal Indian law presented in this case. They believe that the failure of both the district court and the court of appeals to address these uniquely Indian issues represents a serious omission which, if continued, might lead to an improper disposition of these important cases.

STATUTE INVOLVED

The Indian amici believe that in construing the applicability of the McCarran Amendment, 43 U.S.C. § 666, 66 Stat. 560, reproduced in Petitioners' Brief at pp. 3-4, to the adjudication of Indian water rights, it must be read and interpreted in conjunction and *in pari materia* with Public Law 83-280, 67 Stat. 588, partially codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360. The McCarran Amendment was enacted in July 1952. Public Law 83-280 became law only thirteen months later, in August 1953. The Indian *amici* refer to, quote from and cite Public Law 83-280 throughout this brief. It is reproduced in full, as originally enacted, in the Appendix to this brief.

Public Law 83-280 was amended in certain respects not directly relevant to this case by the Indian Civil Rights Act of 1968, 82 Stat. 73, 78-80, 25 U.S.C. §§ 1321-1326. *See Kennerly* v. *District Court,* 400 U.S. 423 (1971).

SUMMARY OF ARGUMENT

I.

The adjudication of Indian water rights involves the determination of complex questions of federal law.

An unbroken line of congressional enactments and decisions of this Court leaves no doubt that the federal courts are, at a minimum, the proper and preferred forum for the resolution of Indian property rights disputes. This factor underscores the impropriety of the district court's dismissal in favor of the state court proceeding on the basis of absention and comity. The abstention doctrine cannot be applied here in any event because there are no qustions of state law presented that could obviate the need for deciding the federal questions. There is no other basis for the federal courts to decline to exercise their federal question jurisdiction.

II.

A. The McCarran Amendment, 43 U.S.C. § 666, waives the government's sovereign immunity only with respect to water rights covered in its proprietary capacity, not in its capacity as holder of water rights in trust or restricted status for the benefit of Indians or Indian tribes. The McCarran Amendment does not mention the words "Indian" or "trust" or "restricted." Not a single Indian or representative of an Indian tribe or organization was called to testify in any of the congressional committee hearings that led to the enactment of the McCarran Amendment. The waiver of precious Indian rights, privileges and immunities simply cannot be inferred from these circumstances given the standards previously set by this Court. The one or two isolated statements by the opponents of the bill are not entitled to any weight.

B. Even if the McCarran Amendment's waiver of sovereign immunity is held to apply to the government

as trustees for Indian water rights, it does not confer subject matter jurisdiction on state courts to adjudicate Indian water rights. In the absence of an express conferral of jurisdiction by Congress, state courts are without authority to adjudicate the property rights of Indians. *Kennerly* v. *District Court,* 400 U.S. 423 (1971); *Minnesota* v. *United States,* 305 U.S. 382 (1939). Congress expressly withheld such jurisdiction in enacting Public Law 83-280, 67 Stat. 588, only one year after the McCarran Amendment. If Congress had intended to confer subject matter jurisdiction on the state courts over Indian water rights, it would have had to waive or repeal or consent to the amendment of the Indian jurisdictional disclaimers contained in the enabling acts or constitutions of most of the Western States. The McCarran Amendment, unlike Public Law 83-280, did not even purport to remove any of these legal impediments to the assumption of state jurisdiction. The critical distinction between this case on the one hand, and the *Eagle County* and *Water Division No. 5* cases on the other, is that federal courts have exclusive jurisdiction over Indians and Indian property whereas state courts have concurrent jurisdiction over most other federal lands and reservations.

III.

The federal court's total abdication of jurisdiction is not the proper way to reconcile the competing federal, state and Indian interests raised by this case. There exist procedures available to the district court which will enable it to eliminate any overlap between it and the state court and will result in the determination of federal questions in the federal court and state matters in the state court. Once the federal

and state courts have made their respective determinations, the two decrees can be integrated and their administration combined under a single federal-state water master.

IV.

The recent and historical performance of state courts in Indian cases provides an ample basis for the Indians' fear of submitting their all too few remaining property rights to adjudication in the state courts. Congress recognized both the existence and legitimacy of these fears in its enactment of 28 U.S.C. § 1362 in 1966.

V.

There is not and never has been any such thing as "unitary" state systems for the adjudication of all water rights within their respective boundaries. Indian water rights have uniformly been determined in the federal courts. The principal authorities relied upon by the petitioners have no application to the facts and circumstances of this case.

ARGUMENT

Introduction

This case concerns nothing more nor less than a choice of forum question. Will the extent and priority of the water rights of the Southern Ute and Ute Mountain Ute Tribes, as well as other, non-Indian, federal water rights, be litigated in state or federal court? *Amici* submit that the federal forum is not only the proper, but also the preferred and indeed the exclusive, forum for the adjudication of Indian reserved rights.

The court of appeals properly decided that it was error for the district court to have dismissed this case under the abstention doctrine. Under that disposition, it was unnecessary for the court of appeals to reach a major unsettled issue lurking in the background of this litigation; does 43 U.S.C. § 666, ("the McCarran Amendment") apply to Indian water rights or authorize their adjudication in state courts. The district court's dismissal of this action in favor of state court adjudication, without addressing this issue, assumed that McCarran applied and that the state courts had such jurisdiction. If this Court should uphold the district court and reverse the court of appeals on the abstention issue, it would then have to confront this heretofore unanswered, but vitally important, question. Alternatively, the jurisdictional issue provides an independent basis for affirming the holding of the court of appeals for if, as we believe, state courts are without jurisdiction to adjudicate Indian water rights, this action must proceed in the federal court.

In this brief, the Indian *amici* will show: (1) that federal courts are the proper and preferred forum for adjudicating Indian water rights; hence abstention is peculiarly inappropriate here; (2) that the McCarran Amendment does not apply to Indian water rights or, alternatively, if it does, it does not authorize their adjudication in state court; (3) that no practical problems will result from adjudicating Indian and federal water rights in federal court that cannot easily be resolved by the proper management of this litigation by the federal district court in a manner consistent with the decision of the court of appeals; and (4) that the Indian tribes' fear of litigating in the state courts is well founded and justified. In the last section of

this brief, the Indian *amici* will respond to some of the petitioners' contentions.

I. Federal Courts Are The Proper and Preferred Forum For The Adjudication of Indian Water Rights.

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson,* 324 U.S. 786, 789 (1945), quoted with approval in *McClanahan* v. *Arizona Tax Commission,* 411 U.S. 164, 168 (1973). Congress has consistently and repeatedly implemented this principle by vesting jurisdiction to adjudicate Indian property rights exclusively in federal courts. The earliest example is 25 U.S.C. § 345 originally enacted in 1894.[1] It confers exclusive jurisdiction on federal district courts to resolve disputes relating to Indian allotments. *See McKay* v. *Kalyton,* 204 U.S. 458 (1907).

25 U.S.C. § 357, enacted in 1901, provides that Indian allotted land "may be condemned for any public purpose under the laws of the State . . . where located in the same manner as land owned in fee may be condemned." On its face the statute is silent as to whether the condemnation proceedings are to take place in state and/or federal court. Despite the fact that Section 357, unlike the McCarran Amendment, makes state substantive law applicable to some Indian lands, this Court held in *Minnesota* v. *United States,* 305 U.S. 382 (1939), that it did not confer jurisdiction on state courts.

> There are persuasive reasons why that statute should not be construed as authorizing suit in a state court. It relates to Indian lands under trust

[1] *See also* 28 U.S.C. § 1353.

> allotments—a subject within the exclusive control of the federal government. The judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts.[2]

In 1953, during the height of the so-called termination era, Congress enacted Public Law 83-280, 67 Stat. 588, now partially codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360 and, as amended in 1968, 25 U.S.C. §§ 1321 and 1322.[3] Public Law 83-280 also demonstrates Congress' commitment to having Indian property disputes resolved in the federal courts. While expressly conferring limited civil jurisdiction on state courts to adjudicate controversies arising in Indian country, Congress specifically withheld from state courts jurisdiction to adjudicate "the ownership or right to possession of [real or personal property, *including water rights,* belonging to any Indian or Indian tribe] or any interest therein." 28 U.S.C. § 1360(b) and 25 U.S.C. § 1322(b) (emphasis added). Thus, even when Congress extended state jurisdiction over Indians, it was careful to insure that Indian property and water rights were not subjected to state court jurisdiction.

Congressional policy could not be more explicit or consistent—disputes involving Indian property rights are to be litigated in federal courts. The Court has faithfully adhered to and even extended that mandate as in *Minnesota* v. *United States, supra.* In furtherance of this same policy, in *Oneida Indian Nation* v.

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[2] 305 U.S. at 389. As noted *infra* at p. 11, Congress expressly approved and followed the holding of Minnesota v. United States in enacting 28 U.S.C. § 1362 in 1966.

[3] We refer to Public Law 83-280 repeatedly throughout this brief and have therefore reproduced it in its entirety in the Appendix.

County of Oneida, 414 U.S. 661 (1974), this Court unanimously held that an Indian tribe's ejectment action, unlike identical actions brought by other claimants to land under federal law, was within the federal courts' federal question jurisdiction. The Court's opinion noted:

> There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law *and federal courts* must be deemed the controlling considerations in dealing with the Indians.[4]

28 U.S.C. § 1362, enacted in 1966, provides for federal question jurisdiction in the federal district courts over civil actions brought by Indian tribes, without regard to the amount in controversy. Its legislative history demonstrates that it was prompted by *Yoder* v. *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation,* 339 F.2d 360 (9th Cir. 1964), which held that Indian tribes could not bring property rights litigation in federal court without satisfying the $10,000 amount in controversy criterion. The reports of the Senate and House Committees cite the following factors in support of the bill that eventually became 28 U.S.C. § 1362:

> 1. "[T]raditionally, the matters concerning Indian lands under trust allotments fall within the exclusive control of the Federal Government. The judicial determination of controversies concerning such lands commonly is committed to the Federal courts. *Minnesota* v. *United States,* 305 U.S. 382 (1938)."[5]

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[4] 414 U.S. at 678, emphasis added.

[5] H.R. Rep. No. 2040, 89th Cong., 2d Sess. 2 (1966), reprinted in 2 U.S. Code Cong. & Admin. News. (1966) 3145, 3146-3147.

2. "[T]he issues involved in cases involving tribal lands . . . are Federal issues" and "particularly as to this class of cases it is appropriate that the actions be brought in a U.S. district court."[6]

3. "There is great hesitancy on the part of the tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have had of the States in which their reservations are situated."[7]

4. "Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years."[8]

All of these considerations, relied upon by Congress in 1966 and equally applicable here, show that the federal district court is the proper *and preferred* forum for adjudicating Indian water rights. Unquestionably, the adjudication of the Indian water rights involved in this case turns on the application of federal law. *United States* v. *District Court for Eagle County,* 401 U.S. 520, 526 (1971); *Arizona* v. *California,* 373 U.S. 546, 600 (1963). In particular, this case presents two critical issues whose outcome is entirely dependent upon the construction of federal statutes and treaties.

The first is the priority of the water rights of the Southern Ute Reservation. The United States and the Southern Ute Tribe contend that they enjoy an 1868 priority, the date of the treaty between the United States and the Ute Indians, 15 Stat. 619, while the

[6] *Id.*
[7] S. Rep. No. 1507, 89th Cong., 2d Sess. 2 (1966).
[8] *Id.*

defendants contend that the original reservation was terminated by Congress and the succession of title interrupted so that most of the Southern Ute Tribe's water rights have a much later priority, 1938. The second critical issue concerns the extent or measure of the Indian water rights. Are the Utes' water rights to be quantified solely by reference to the amount of water required for agricultural purposes or do their reserved rights also encompass other uses such as the extraction and development of minerals or the maintenance of stream fisheries?[9] The answer turns on a determination of the purposes of the reservation which is preeminently an issue of federal law. *The Kansas Indians,* 72 U.S. (5 Wall.) 737 (1867). Further, the extent of a tribe's water rights may often depend upon the boundaries of the reservation for one measure of the water right is the amount necessary to develop the Indian land. *See, e.g., Arizona* v. *California, supra,* 373 U.S. at 601. Consequently, if state courts are held to have jurisdiction to adjudicate Indian water rights, they might also be authorized to resolve the complex federal questions involved in Indian boundary disputes which have heretofore been committed exclusively to the federal courts.[10]

[9] *See* Arizona v. California, *supra,* 373 U.S. at 600-601 and United States v. Nevada, 412 U.S. 534 (1973).

[10] *See, e.g.,* Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970). In addition to the paramount issues of federal law that are presented in Indian water rights cases, their eventual outcome will also hinge on such critical factual determinations as how much of the reservation's acreage is "practicably irrigable" and how much water is required to irrigate that acreage. Arizona v. California, *supra,* 373 U.S. at 600. On the basis of the record set forth in Part IV of the brief, the Indian amici have reason to be fearful of the outcome if such matters are entrusted to state courts. In enacting 28 U.S.C. § 1362 in 1966 not only did Congress want

Perhaps the most fundamental purpose of the federal court system is to determine precisely such issues of federal law. *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 162-163 (1803); *Bell* v. *Hood,* 327 U.S. 678, 684 (1946). Once their federal question jurisdiction is invoked, the federal courts have never deferred the decision of federal questions to state courts with but one limited exception not applicable here—where the resolution of a doubtful question of state law could obviate the need for determination of the federal, usually constitutional, question. *Harris County Commissioners Court* v. *Moore,* 420 U.S. 77 (1975); *Zwickler* v. *Koota,* 389 U.S. 241, 248-249 (1967); *Harman* v. *Forssenius,* 380 U.S. 528, 534-535 (1965). *See particularly England* v. *Louisiana Medical Examiners,* 375 U.S. 411 (1964).

When these traditional limits on absention are combined with the repeated insistence, both by Congress and this Court, that federal courts are the proper forum for resolving Indian property rights disputes, the petitioners' argument becomes totally untenable. Thus, several lower courts have held that it is particularly inappropriate for federal courts to invoke abstention in cases that raise federal Indian law issues, even where there are doubtful questions of state law presented whose determination by a state court might obviate the need for deciding the federal question. *Moses* v. *Kinnear,* 490 F.2d 21 (9th Cir. 1973); *Walker River Paiute Tribe* v. *Sheehan,* 370 F. Supp. 816 (D. Nev. 1973); and *Great Lakes Inter-Tribal Council, Inc.* v. *Voigt,* 309 F. Supp. 60 (W.D. Wis. 1970) (Doyle, J.).

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federal Indian law issues to be decided by federal courts, it also recognized the legitimacy of the tribes' "great hesitancy . . . to use state courts." See text accompanying note 7 *supra.*

II. The McCarran Amendment Does Not Confer Jurisdiction On State Courts To Adjudicate Indian Water Rights.

The preceding argument assumes the McCarran Amendment applies to Indian water rights and authorizes, but certainly does not require, their adjudication in state court. Even so, an unbroken line of congressional enactments and decisions of this Court make it absolutely clear that federal courts are the proper and preferred forums for resolving Indian property disputes. For this reason, as well as the others urged by the United States in its brief, the district court's dismissal on the grounds of abstention and comity was improper.

The Indian *amici* contend that the district court's dismissal was erroneous in that the court mistakenly assumed, without analysis, that Indian water rights are subject to adjudication in state courts. The court's conclusion was wrong for two reasons. First, the McCarran Amendment's waiver of sovereign immunity applies only to water rights owned by the United States in a proprietary capacity, not to water rights held in trust or restricted status for the benefit of Indians and Indian tribes. Second, even if the McCarran Amendment's waiver of sovereign immunity is applicable to the United States as trustee for Indian water rights, it does not confer subject matter jurisdiction on the state courts. Without an express conferral, state courts lack jurisdiction over Indians and Indian property.

A. The McCarran Amendment Does Not Apply to Indian Water Rights.

The McCarran Amendment does not mention the words "Indian" or "trust" or "restricted." By its terms, the McCarran Amendment waives the sover-

eign immunity of the United States "where it appears that the United States is the owner of or is in the process of acquiring water rights . . . and the United States is a necessary party to such suit." It does not waive the sovereign immunity of Indian tribes.[11]

When Congress refers to Indian property, it customarily uses different words of description. Again the contrast with the contemporaneous Public Law 83-280, *supra,* is instructive. There, Congress specifically referred to Indian waters rights as follows: "real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States." 28 U.S.C. § 1360(b). The water rights are described as "belonging" to the Indian or Indian tribe, not to the United States. The United States is not the proprietary owner; it simply holds the property as trustee or imposes a restriction against alienation. *See also* section (b) of the Act of July 18, 1966, 80 Stat. 304, which refers to "lands of the United States, including trust or restricted lands."

Clearly then, the McCarran Amendment, on its face does not specifically include Indian water rights. The legislative history is inconclusive. What is most revealing is that the author and sponsor of the statute that bears his name, Senator McCarran, was unsure whether it applied to Indian water rights. 97 Cong. Rec. 12948 (1951), exchange between Senators McCarran and Chavez. Of course, as this Court has recently and frequently noted citing a long list of its prior decisions, any and all ambiguities in statutory constructions are to be resolved in favor of the Indians. *Antoine* v. *Washington,* 420 U.S. 194, 199-200 and 206 (1975); *McClanahan* v. *Arizona Tax Commission, supra,* 411 U.S. at 174; *Menominee Tribe* v. *United States,* 391 U.S. 404, 406, n. 2 (1968); and *Squire* v. *Capoeman,* 351 U.S. 1, 6-7 (1956).

[11] *See* United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512-513 (1940).

Since Indian water rights trace their lineage back to this Court's 1908 decision in *Winters* v. *United States,* 207 U.S. 564, whereas the reserved rights of other federal reservations were not firmly established by this Court until its 1963 decision in *Arizona* v. *California, supra,* 373 U.S. at 595-602, it would be easy, but not incorrect, to assume that Congress had Indian reserved water rights squarely in mind when the McCarran Amendment was enacted in 1952. The legislative history (as discussed in the brief of the United States) indicates that Congress focused its attention on private water rights purchased by the United States, such as those at issue in the Santa Margarita litigation.[12] The legislative history is replete with references to the numerous other instances in which the United States acquired private rights through purchase.[13] Indians were, at most, a confused afterthought.

Other than the inconclusive dialogue between Senators McCarran and Chavez previously cited, there

[12] United States v. Fallbrook Public Utility District, 165 F. Supp. 806 (S.D. Cal. 1958) and 347 F.2d 48 (9th Cir. 1965).

[13] *See, e.g.,* 97 Cong. Rec. 12948 (1951), remarks of Senator McCarran.

are only two other references to Indian water rights in the entire legislative history of the McCarran Amendment and its unsuccessful predecessors. They are cited in the petitioner's brief at p. 25, note 13. As the petitioners note, the statements were made during the course of the Senate Committee's hearings by representatives of the Interior and Justice Departments who opposed the bill. It is well settled that such statements "have scant probative value."[14] As this Court recently and emphatically put it:

> "'[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach.' *Labor Board* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 66. 'It is the sponsors that we look to when the meaning of the statutory words is in doubt.' *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384, 394-395."[15]

Several things are certain. Not a single proponent of the McCarran Amendment nor any House or Senate Committee Report indicates a definite intention to include Indian rights within its scope. Neither its language nor its legislative history manifests the explicitness that this Court has held requisite to waive Indian rights, privileges and immunities. *DeCoteau* v. *District County Court,* 420 U.S. 425, 444-445

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[14] National Woodwork Manufacturers Assoc. v. NLRB, 386 U.S. 612, 639 (1967).

[15] *Id.* at 639-640. Other citations omitted. The opinion goes on to say: "In addition to all else, '[t]he silence of the sponsors of [the] amendments is pregnant with significance. . . .' *Labor Board* v. *Fruit & Vegetable Packers, supra,* 377 U.S. at 66."

(1975); *Mattz* v. *Arnett,* 412 U.S. 481, 504-505 (1973); *McClanahan* v. *Arizona Tax Commission, supra,* 411 U.S. at 175, n. 13; and *Menominee Tribe* v. *United States, supra,* 391 U.S. 404. Not a single Indian or representative of any Indian tribe or organization was provided an opportunity to testify at committee hearings concerning the possible impact of the bill on Indians and Indian water rights. To hold, against this background, that Indian water rights are nonetheless covered by the vague words of the McCarran Amendment would constitute precisely the type of "backhanded abrogation" of Indian rights and immunities that was condemned by this Court in *Menominee Tribe* v. *United States, supra,* 391 U.S. at 412. It certainly would not comport with "[t]he overriding duty of our federal government to deal fairly with Indians wherever located." *Morton* v. *Ruiz,* 415 U.S. 199, 236 (1974).

B. The McCarran Amendment Does Not Authorize the Adjudication of Indian Water Rights in State Court.

In the absence of the McCarran Amendment, there would be two jurisdictional or quasi-jurisdictional bars to the adjudication of Indian water rights in state court, the sovereign immunity of the United States and the tribes, *Dugan* v. *Rank,* 372 U.S. 609 (1963), and *United States* v. *United States Fidelity & Guaranty Co., supra,* 309 U.S. at 512-513, and lack of subject matter jurisdiction, *Kennerly* v. *District Court,* 400 U.S. 423 (1971), and *Williams* v. *Lee,* 358 U.S. 217 (1959). The most that the McCarran Amendment could accomplish is the removal of one, but only one, of these obstacles, sovereign immunity. It merely

provides that "[c]onsent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source" and that the "United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto *by reason of its sovereignty*. . . ." (emphasis added). It does not in any way purport to confer subject matter jurisdiction on any court, state or federal.

Thus, assuming *arguendo* that the McCarran Amendment's waiver of sovereign immunity applies to Indian water rights as well as to the water rights owned by the United States in its proprietary capacity, suits to adjudicate Indian water rights can be brought only where there is preexisting subject matter jurisdiction. While the federal courts have such subject matter jurisdiction, the state courts do not. *See Minnesota* v. *United States, supra,* 305 U.S. 382; *Seymour* v. *Superintendent,* 368 U.S. 351 (1962), holding that state courts do not have criminal jurisdiction over crimes committed by Indians in Indian country; *Williams* v. *Lee, supra,* 358 U.S. 217, holding that state courts do not have concurrent jurisdiction over civil actions brought by non-Indians against Indians which arise on non-Indian lands within the reservation; and *Kennerly* v. *District Court, supra,* 400 U.S. 423, following the holding of *Williams* v. *Lee* and also holding that states can acquire civil jurisdiction over Indians in Indian country only by following the procedures prescribed by Congress. The doctrine is nearly as old as the Republic, tracing its genesis to Justice Marshall's seminal opinion in *Worcester* v. *Georgia,*

31 U.S. (6 Pet.) 515 (1832).[16] *See also United States* v. *Kagama,* 118 U.S. 375 (1886), and *McClanahan* v. *Arizona Tax Commission, supra,* 411 U.S. at 175, n. 13.

McClanahan v. *Arizona Tax Commission, supra,* 411 U.S. 164, also illustrates the state courts' lack of subject matter jurisdiction over Indians and Indian lands. It holds that Arizona cannot impose its personal income tax on reservation Indians whose income is derived from reservation sources absent the consent of Congress. One of the reasons for reaching this result was that Arizona acknowledged that its courts could not exercise either civil or criminal jurisdiction over reservation Indians. The court commented: "In light of our prior cases, appellee has no choice but to make this concession" citing *Kennerly* v. *District Court, supra,* 400 U.S. 423, and *United States* v. *Kagama, supra,* 118 U.S. 375. *McClanahan, supra,* 411 U.S. at 478, n. 19. In the absence of civil or criminal jurisdiction, it was impossible to conceive how the state's tax could either be imposed or collected and that, said the court, "would seem to dispose of the case." 411 U.S. at 479.

Several factors make it evident that the McCarran Amendment did not confer subject matter jurisdiction to adjudicate Indian water rights in state courts: (1) its language, particularly as contrasted with Public Law 83-280, *supra;* (2) the express prohibition against state courts adjudicating Indian water rights in the contemporaneous Public 83-280; (3) the absence, again in contrast to Public Law 83-280, *supra,* of any provi-

[16] This Court's recent Indian opinions have looked to and been inspired by the teachings of Worcester. *See* McClanahan v. Arizona Tax Commission, *supra,* 411 U.S. 164 and United States v. Mazurie, 419 U.S. 544 (1975).

sion repealing or waiving or consenting to the amendment of the Indian jurisdictional disclaimers in most of the enabling acts and constitutions of the western states; and (4) the holding and reasoning of *Minnesota* v. *United States, supra,* at 305 U.S. 382. The absence of state court subject matter jurisdiction over Indians and Indian property also distinguishes this case from the *Eagle County* [17] and *Water Division No. 5* [18] cases because state courts do have concurrent jurisdiction over most other federal lands.

1. Nothing in the McCarran Amendment confers jurisdiction.

Once again, comparison of the language of the McCarran Amendment with Public Law 83-280, *supra,* is instructive. Public Law 83-280 expressly confers jurisdiction on the courts of several enumerated states over criminal offenses "committed by or against Indians in [certain] areas of Indian country" and over "civil causes of action between Indians or to which Indians are parties which arise in [certain] areas of Indian country." There is no comparable conferral of jurisdiction in the McCarran Amendment. Public Law 83-280 is a Congressional acknowledgement that state courts can obtain subject matter jurisdiction over Indians and Indian country only through express Congressional grant. *Kennerly* v. *District Court, supra,* 400 U.S. 423.

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[17] United States v. District Court for Eagle County, 401 U.S. 520 (1971).

[18] United States v. District Court in and for Water Division No. 5, 401 U.S. 527 (1971).

2. State court jurisdiction was expressly withheld in Public Law 83-280.

As has already been noted (*supra,* p. 10), Public Law 83-280 expressly withheld from its limited grant of jurisdiction to state courts the power to adjudicate Indian water rights. Petitioners would have us believe that Congress expressly excluded state court jurisdiction over Indian water rights in August 1953 after having made Indian water rights subject to state jurisdiction only one year earlier. Such an absurd result should not be attributed to Congress. *United States* v. *Katz,* 271 U.S. 354, 357 (1926); *United States* v. *Oregon & California R. Co.,* 164 U.S. 526, 539 (1896). The McCarran Amendment and Public Law 83-280, read *in pari materia* [19] yield the inescapable conclusion that Indian water rights were not subjected to adjudication in state courts.

3. The McCarran Amendment does not waive, repeal, or consent to the amendment of the provisions in most of the enabling acts and constitutions of the western states disclaiming jurisdiction over Indian lands.

The enabling acts and/or the constitutions of most of the western states contain explicit provisions disclaiming jurisdiction over Indian lands within their boundaries. A typical example is Arizona's:

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to . . . all lands lying within said

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[19] See Menominee Tribe v. United States, *supra,* 391 U.S. 404, where Public Law 83-280 was read *in pari materia* with the Menominee Termination Act, 25 U.S.C. § 891 *et seq.*

boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that *until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.*[20]

In addition to conferring certain limited civil and criminal jurisdiction over Indians and Indian country

[20] Arizona Enabling Act, 36 Stat. 557, 569, quoted and construed in McClanahan v. Arizona Tax Commission, *supra*, 411 U.S. at 175. This same language appears in Arizona's Constitution at Art. 20, § 4 and in the Enabling Acts and Constitutions of New Mexico (36 Stat. 557, 558-559 and Art. 21, § 2), Utah (28 Stat. 107, 108 and Art. 3, § 2), North Dakota (25 Stat. 676, 677 and Art. 26, § 203), South Dakota (25 Stat. 676, 677 and Art. 22, § 2), Montana (25 Stat. 676, 677 and Art. 12, § 2) and Washington (25 Stat. 676, 677 and Art. 26). The Wyoming and Idaho Enabling Acts and State Constitutions contain similar provisions. *See* Organic Act of Wyoming, 15 Stat. 178, and Art. 21, § 26 of Wyoming Constitution and Organic Act of Idaho, 12 Stat. 808, and Art. 21, § 19 of Idaho Constitution.

The disclaimer clause in the Colorado Enabling Act, 18 Stat. 474, is different in form. It provides: "The constitution shall be republican in form and make no distinction in political rights on account of race or color, except Indians not taxed. . . ."

This disclaimer does more than simply immunize Colorado Indians from state taxation; "Indians not taxed" are words of description. The clause means that Colorado reservation Indians have distinct legal attributes and are not subject to Colorado's civil or political jurisdiction. In any event, this Court and the Colorado Supreme Court have held that the form, or even the absence, of Indian jurisdictional disclaimer provisions makes no material difference so far as the exercise of state jurisdiction is concerned. United States v. Kagama, *supra*, 118 U.S. 375; Donnelly v. United States, 228 U.S. 243, 270-272 (1913); and Whyte v. District Court of Montezuma County, 140 Colo. 344, 346 P.2d 1012 (1959), *cert. denied*, 363 U.S. 829 (1960).

on several enumerated states, Public Law 83-280 also provided a vehicle for other states to obtain jurisdiction. Section 6 of Public Law 83-280, 67 Stat. 588, 590 waives or repeals the disclaimer provisions in state enabling acts and gives the consent of the United States for the people of the states to amend their constitutions or statutes containing "legal impediments" to the assumption of jurisdiction.[21] It further provides "[t]hat the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be." The same provision was reenacted as part of the 1968 amendments to Public Law 83-280, 25 U.S.C. § 1324.

The McCarran Amendment, by stark contrast, is totally silent as to the Indian jurisdictional disclaimer provisions in state enabling acts, state constitutions and state statutes. Congress has properly acknowledged that extension of state jurisdiction to Indians and Indian country requires (1) the waiver or repeal by the United States of such provisions in the enabling acts, (2) the consent of the United States for the people or legislatures of the states to remove any similar legal impediemnts in their constitutions or statutes; and (3) the actual removal of the impediments by the people of the state.[22] Nothing is more indicative of congressional intent *not* to confer state

[21] *See also* section 7 of Public Law 83-280 and Quinault Tribe of Indians v. Gallagher, 368 F.2d 648 (9th Cir. 1966), *cert. denied*, 387 U.S. 907 (1967).

[22] The 1968 amendments to Public Law 83-280 added a fourth requirement, the consent of the affected Indian people. 25 U.S.C. § 1326. *See* Kennerly v. District Court, *supra*, 400 U.S. 423.

courts with subject matter jurisdiction to adjudicate Indian water rights than the absence of any method for removing the legal impediments in the McCarran Amendment. Its absence also further demonstrates that the "comprehensive and detailed congressional scrutiny manifested in those instances where Congress has undertaken to extend the civil or criminal jurisdictions of certain States to Indian country," *Kennerly* v. *District Court, supra,* 400 U.S. at 427, is nowhere to be found in the McCarran Amendment and its legislative history. Without a repeal or waiver of the disclaimer provisions in the state enabling acts, the consent of the United States to the amendment of the similar provisions in state constitutions or statutes, and their actual amendment by the people of the state, the extension of state court jurisdiction to adjudicate Indian water rights cannot be effective.

4. Minnesota v. United States *conclusively demonstrates that the McCarran Amendment did not confer subject matter jurisdiction.*

In 1901, Congress amended the General Allotment Act of 1887, 25 U.S.C. § 331 *et seq.,* 24 Stat. 388, by making Indian allotted land subject to condemnation under the laws of the state where located in the same manner as land owned in fee. 25 U.S.C. § 357, 31 Stat. 1058, 1083, 1084. Pursuant to this statute, Minnesota brought suit in state court to condemn a right of way for a highway over several parcels of allotted land within the Grand Portage Indian Reservation. The United States was named as defendant. The United States Attorney, appearing specially, removed the case to the federal court which entered a judgment condemning the land.

On review (*Minnesota* v. *United States, supra,* 305 U.S. 382), this Court held: first, that the United States was an indispensable party to the condemnation suit; second, that the United States could not be sued without its consent; third, that while 25 U.S.C. § 357 constituted a waiver of the government's sovereign immunity, it did not confer subject matter jurisdicion on state courts because "the judicial determination of controversies concerning [Indian lands] has been commonly committed exclusively to federal courts," 305 U.S. at 389; and further, that since the federal court's jurisdiction on removal was derivative, it did not and could not acquire jurisdiction that was lacking in the state court. The suit was therefore dismissed.

If state courts did not obtain jurisdiction by a statute making Indian lands subject to condemnation under state laws in the same manner as land owned in fee, *a fortiori* state courts could not obtain jurisdiction under the McCarran Amendment where (a) there was no mention of Indians or Indian lands; (b) state substantive laws were not made applicable to Indian lands; and (c) there was no provision that Indian lands were to be accorded the same treatment as fee lands.

5. Eagle County *and* Water Division No. 5 *distinguished: exclusive federal jurisdiction over Indian reservations vs. concurrent federal-state jurisdiction over most other federal lands.*

In *Minnesota* v. *United States, supra,* the United States contended that "a statute granting permission to sue the United States must be construed to apply only to the Federal courts unless there is an explicit

reference to the state tribunals." 305 U.S. at 389, n. 5. This Court refused to accept this broad contention citing, *inter alia, United States* v. *Jones,* 109 U.S. 513 (1883). Its holding in favor of the United States was predicated instead on narrower grounds, the unique federal-Indian relationship and the federal courts' exclusive jurisdiction to resolve controversies concerning Indian lands. 305 U.S. at 389 and n. 5. This aspect of *Minnesota* v. *United States* is crucial to understanding the difference between the Indian water rights at issue in this case and the water rights owned by the United States in its proprietary capacity involved in the *Eagle County* and *Water Division No. 5* cases.

Eagle County and *Water Division No. 5* hold that the reserved and other water rights owned by the United States in its proprietary capacity are subject to adjudication in state courts under the McCarran Amendment. The Court's opinions do not address the subject matter jurisdiction issue and the United States did not contend the federal courts have exclusive jurisdiction over the federal lands and interests involved in the two cases.[23]

The issue was not addressed by the United States and the Court for a good reason—most federal lands owned by the United States in its proprietary capacity, unlike the lands and water rights of *amici* Southern Ute and Ute Mountain Ute Indian Tribes at is-

[23] The primary arguments advanced by the United States were that the McCarran Amendment's waiver of sovereign immunity did not attach to reserved, as opposed to acquired or appropriated, water rights and that the Colorado adjudications were not the type of general stream adjudications to which the United States consented. *See* briefs of the United States in Nos. 87 and 812, October Term, 1970.

sue here, are subject to concurrent federal and state jurisdiction. It was not necessary for the McCarran Amendment to confer subject matter jurisdiction on state courts to adjudicate water rights owned by the United States in its proprietary capacity because the state courts had preexisting jurisdiction over these federal lands. Once the McCarran Amendment removed the sovereign immunity obstacle, the state courts were free to exercise their concurrent jurisdiction.

The doctrine of concurrent federal-state jurisdiction over most federally owned, non-Indian lands stems from *New Orleans* v. *United States,* 35 U.S. (10 Pet.) 662 (1836), and *Pollard* v. *Hagan,* 44 U.S. (3 How.) 212 (1845). When a new state is created, the United States keeps title to the land that it chooses to retain, but general governmental jurisdiction over the land is held to pass to the state. Later cases seem to erode the absolutism of *New Orleans* and *Pollard,* particularly as applied to the western states. While it may be difficult to pinpoint precisely where state authority begins and federal authority ends and *vice versa,* and it is not necessary for our limited purposes here to do so; the law now appears settled that jurisdiction over most federal lands is concurrent. The best statements of the current law seem to be *Utah Power and Light Co.* v. *United States,* 243 U.S. 389, 404-405 (1917); *Omaechevarria* v. *Idaho,* 246 U.S. 343 (1918); and *McKelvey* v. *United States,* 260 U.S. 353 (1922).[24] *See also* 16 U.S.C. § 480 (states re-

[24] In Utah Power and Light, the Court said: [F]or many purposes a state has civil and criminal jurisdiction over lands within its limits belonging to the United States . . . [W]hile the state may punish public offenses, such as murder or larceny, committed

tain civil and criminal jurisdiction within national forests.)

We have repeatedly and advisedly said that joint federal-state jurisdiction is the rule with regard to "most" federal lands other than Indian reservations because there are some federally owned lands other than Indian reservations where the United States exercises exclusive jurisdiction. For the most part, these are federal lands acquired under and in accordance with Article I, § 8, cl. 17 of the Constitution.[25] The contrast between areas of exclusive and concurrent jurisdiction is discussed at some length in *Surplus Trading Post* v. *Cook*, 281 U.S. 647 (1930).[26] *See also Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518

on such lands, and may tax private property, such as livestock, located thereon, it may not tax the lands themselves or invest others with any right whatever in them" 243 U.S. at 404. Similarly, McKelvey states: "It is firmly settled that Congress may prescribe rules respecting the use of the public lands. . . . It is also settled that the states may prescribe police regulations applicable to public lands areas, so long as the regulations are not arbitrary or inconsistent with applicable congressional enactments." 260 U.S. at 359.

[25] "The Congress shall have Power To exercise [exclusive Legislation] over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

[26] The discussion of Indian Reservations in Surplus Trading Post v. Cook, *supra*, is, of course, *dicta*. It is somewhat misleading but the Court has subsequently put it in proper perspective by carefully limiting its applicability to state jurisdiction over activities of non-Indians within the reservation that do not in any way interfere with tribal self-government. McClanahan v. Arizona Tax Commission, 411 U.S. 164, particularly at 168 and 179-180. *See also* McClanahan's clarification of Organized Village of Kake v. Egan, 369 U.S. 60 (1962), 411 U.S. at 176, n. 15.

(1938). But exclusive federal jurisdiction over non-Indian federal lands and reservations is the exception, not the rule.[27]

Here then, is the lesson to be learned from all of this. A statute granting permission to sue the United States that does not specify any particular forum[28] is construed to apply to any court with preexisting subject matter jurisdiction. The government's argument that such statutes should be limited to authorizing suits only in federal court unless there is a specific reference to state courts was rejected in *Minnesota* v. *United States, supra*, 305 U.S. 382. Since most federal, non-Indian lands are subject to concurrent federal and state jurisdiction, *Eagle County* and *Water Division No. 5*, correctly held that the McCarran Amendment's waiver of sovereign immunity permitted the adjudication of the government's proprietary water rights in state courts. However, because only the federal courts have preexisting subject matter jurisdiction over Indian property interests, a statute that permits suits against the United States in its capacity

[27] A May 1969 report entitled "Federal Legislative Jurisdiction" prepared by the Lands and Natural Resources Division of the Department of Justice for the Public Land Law Review Commission states at p. 56: [T]he great bulk of federally owned areas which constitute the lands of the public domain, including the great majority of such areas which have been reserved or withdrawn for various Federal purposes, constitute to be held by the United States merely in a proprietorial status, with legislative jurisdiction remaining in the respective host States.

[28] Of course, since the government can condition its waiver of sovereign immunity in any way that it pleases, it can specify and limit the forums in which it elects to be sued. *See, e.g.*, the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 *et seq.* This case and the Minnesota case deal with instances in which Congress did not specify the forum.

as trustee of Indian lands or water rights applies only to federal courts unless the statute very explicitly extends jurisdiction to the state courts. That is the teaching of *Minnesota* v. *United States, supra.* The McCarran Amendment did not confer subject matter jurisdiction on any court to adjudicate any water rights.[29] It did not have to. It simply waived the government's sovereign immunity which had the effect of authorizing water rights adjudications against the United States in any court with preexisting subject matter jurisdiction. The critical distinction between this case on the one hand and *Eagle County* and *Water Division No. 5* on the other is that federal courts have exclusive jurisdiction to resolve Indian property disputes whereas Federal and state courts have concurrent jurisdiction over most other federal lands.

III. Adjudicating Federal and Indian Water Rights In Federal Court Will Not Create Any Practical Problems Or Cause a Crisis In Federal-State Relations.

The broad problem presented in this case is how to reconcile the interests of the state and its courts in maintaining jurisdiction and control over the water rights established pursuant to state law with the interests of the United States, the Nation's Indian tribes and the federal courts in having questions of federal and Indian law resolved in the federal courts. This problem has not been adequately addressed by either the parties or the lower courts.

This case is here on a motion to dismiss that was granted by the district court. The decision of the court

[29] That is the conclusion of the only court to address this question. *In re* Green River Drainage Area, 147 F. Supp. 127, 134 (D. Utah, 1956).

of appeals, simply and properly reverses the district court's dismissal and requires that the federal questions raised by the complaint of the United States be litigated and determined in a federal court. It does not in any way limit the district court's discretion in its subsequent management of this litigation. All of the practical problems of duplication, administration, etc., recited by the petitioners and the *amici* who support them can easily be resolved through the application of commonplace techniques for the management of complex federal litigation.

Specifically, contrary to the repetitious, wholly unsupported assertions of the petitioners and the *amici* states, there is nothing in the court of appeals' decision that precludes the district court from:

(a) bifurcating the case pursuant to Rule 42(b), F.R.C.P.;

(b) limiting the first phase of the case to determining the federal questions involving the extent and priority of the water rights of the Southern Ute and the Ute Mountain Ute Indian Tribes and the other rights claimed by the United States;

(c) ordering that the adjudication of the rights claimed by the defendants and intervenors under state law proceed in state court;

(d) ordering the United States to appear in state court to defend against the claims of the defendants and intervenors;

(e) eventually incorporating the state court decree defining the water rights of the defendants and intervenors in its final judgment; and,

(f) appointing the state court's water master to enforce the federal decree.

Would not the principles underlying federalism and comity be furthered by this kind of bifurcation, with federal matters being decided in federal courts and state matters in state courts with a final decree integrating the two for purposes of administration and enforcement? There is a role for the federal courts in a properly functioning federalism. If, in the exercise of its sound discretion, the district court elects to proceed with this case as we have just outlined or in some similar manner, the tale of woes imagined in the briefs of petitioners and their *amici* will disappear. They were highly suspect at the outset.[30]

There need not be any unnecessary expense, duplication, hardship [31] or confusion resulting from the federal district court in Denver doing what Federal district courts have always done—deciding federal questions and enforcing federal and Indian rights. And if that causes a rupture in federal-state relations, it is hardly the fault of the federal government or the federal courts.

[30] The National Water Commission, a respected expert body established by Congress (Act of September 26, 1966, 82 Stat. 868), whose members were appointed by the President, conducted a comprehensive analysis of the problems raised by this type of litigation, heard from almost everybody and then recommended in its recent report that all Indian water rights be adjudicated exclusively in federal district courts. It also recommended that all other federal water rights be determined under state procedures with a right to appeal to the United States Courts of Appeals. "Water Policies for the Future, Final Report to the President and to the Congress of the United States by the National Water Commission," 1973, Chapters 13 and 14. Surely, if the problems of so-called dual jurisdiction are as horrendous as the petitioners and their amici make them out to be, and if the federal and state court decrees could not be integrated and administered into a workable framework, the National Water Commission would not have made such recommendations.

[31] In all likelihood, the burden of defending against the claims of the United States and the Indian Tribes will be borne primarily by the same defendants and intervenors who filed the motion to dismiss and who appear in this Court as the actual petitioners. Mary Akin is not here. The State of Colorado is. So are the Board of Water Commissioners of the City and County of Denver and the Colorado River Conservation District.

Let us stop the charade. The practical problems are not what is motivating the defendants. If they were out to reconcile the competing federal, state and Indian interests involved in this litigation, they would certainly have chosen a less blunt instrument than the clumsy and crude motion to dismiss. Like almost all choice of forum battles, this one involves primarily strategic considerations. The Indian *amici* have no hesitancy in stating that they prefer the federal forum. Unfortunately perhaps, the sad history of Indian-white relations in this country up to and including contemporary times demonstrates that it is to the federal courts that Indians must go for the vindication of their rights.

IV. There Is Good Reason For The Insistence By Congress and This Court That Indian Property Rights Be Adjudicated In Federal Courts.

The historical animus between the Nation's Indian tribes and the people of the states is too well known to require documentation. This Court's decision in *Worcester* v. *Georgia, supra,* 31 U.S. (6 Pet.) 515 provoked perhaps the first constitutional confrontation between the executive and judicial branches of government. Eighty-nine years ago, in upholding the constitutionality of an Act of Congress making it a federal crime for one Indian to murder another, the Supreme Court said:

> These Indian tribes are the wards of the Nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.

United States v. *Kagama, supra,* 118 U.S. at 383-384 (emphasis in original). Indeed, the federal government's powerful and pervasive role in Indian affairs grew directly out of the Indians' overwhelming need for protection from the states. See the original Indian Nonintercourse Act, 1 Stat. 137 (1790), now 25 U.S. C. § 177 and *Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U.S. 991 (1960).

What tends to be more surprising to those not familiar with the work-a-day world of Indians is that the adversary relationship with the states continues to this day. This Court commented upon it recently in *Oneida Indian Nation* v. *County of Oneida, supra,* 414 U.S. at 678, quoted *supra* at p. 11.

Part of the reason for the Indians' fear of subjecting their water and other property rights to adjudication in state courts is shown by an analysis of the recent record of Indian litigation in this Court. During its past three terms, the Court reversed or vacated seven decisions of state courts that were adverse to Indian property or sovereign interests in which a state, or one of is agencies, sought affirmance. Most of the decisions were unanimous. One was reversed in part and affirmed in part. The seven are: *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973), reversed in part (9-0) and affirmed in part (6-3); *McClanahan* v. *Arizona Tax Commission, supra,* 411 U.S. 164, reversed (9-0); *Tonasket* v. *Washington,* 411 U.S. 451 (1973), vacated (9-0); *Mattz* v. *Arnett, supra,* 412 U.S. 481, reversed (9-0); *Washington Game Dept.* v. *Puyallup Tribe,* 414 U.S. 44 (1973), reversed (9-0); *Satiacum* v. *Washington,* 414 U.S. 1 (1973), vacated (9-0); and *Antoine* v. *Washington, supra,* 420 U.S. 194, reversed (7-2). The states' positions in two cases that arose in the federal courts were also unanimously repudiated, *Oneida Indian Nation* v. *County of Oneida, supra,* 414 U.S. 661, in which New York filed a brief *amicus curiae* and participated in the oral argument, and *United States* v. *Mazurie, supra,* 419 U.S. 554, in which Wyoming filed a brief *amicus curiae* and participated in oral argument. Standing alone on the other side is the affirmance (6-3) of the South Dakota Supreme Court in *DeCoteau* v. *District County Court, supra,* 420 U.S. 425.

Going back past the three most recent terms in which Indian cases appeared with unusual frequency, the record is not much better. The official positions of the states and/or their courts were rejected in nine cases, all but three unanimously: *Williams* v. *Lee, supra,* 358 U.S. 217, (9-0); *Seymour* v. *Superintendent, supra,* 368 U.S. 351, (9-0); *Metlakatla Indian Comm.* v. *Egan,* 369 U.S. 45 (1962); *Arizona* v. *California, supra,* 373 U.S. 546, 595-602, (8-0); *Warren Trading Post* v. *Arizona Tax Commission, supra,* 380 U.S. 685, (9-0); *Poafpybitty* v. *Skelly Oil Co.,* 390 U.S. 365 (1968), (8-0); *Menominee Tribe* v. *United States, supra,* 391 U.S. 404, (6-2); *Choctaw Nation* v. *Oklahoma, supra,* 397 U.S. 620, (7-2); and *Kennerly* v. *District Court, supra,* 400 U.S. 423, (7-2). State positions were upheld only three times over that same 1959 to 1971 period; *Federal Power Commission* v. *Tuscarora*

Indian Nation, supra, 362 U.S. 991, (6-3); *Organized Village of Kake* v. *Egan, supra,* 369 U.S. 60, (9-0) and *Puyallup Tribe* v. *Dept. of Game,* 391 U.S. 392 (1968), (9-0).[32] One must search the records of the Supreme Court back to 1949 to find the last time that a state court decision favorable to Indians was reversed. In that case, *Oklahoma Tax Commission* v. *Texas Co.,* 336 U.S. 342 (1949), the court overruled one of its own prior decisions on which the state court had relied.

Anyone who seriously questions why Indians are distrustful of state authorities need look no further than Western Washington's recent fishing rights controversy, *United States* v. *Washington,* 384 F. Supp. 312 (W.D. Wash. 1974), affirmed, —— F.2d —— (9th Cir. 1975). Judge Boldt's extensive findings of fact are fortunately included with his published opinion. We quote from just a few that will illustrate our point:

> 194. In dealing with fishing by members of the Plaintiff tribes in a manner different from that expressly provided in their respective regulations, both the Game Department and the Department of Fisheries have seized nets and other property of those members and have released, confiscated and attempted to prevent the sale and transportation of anadromous fish which are under their respective jurisdictions and which have been caught by those members.

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[32] Most of the Indian cases that found their way to this Court since 1959 through the state courts arose as either appeals from criminal convictions, typically for alleged violations of state hunting and fishing laws, or as applications for tax refunds. For obvious reasons, they could not have originated in the federal courts.

> 195. Both the Fisheries and Game Departments have, on several occasions, disposed of or retained for unusually long period of time (often extending over longer periods than one year) boats, nets, whether attended or unattended, or other property of members of the Plaintiff tribes and fish taken from the nets of such members. The tribal members have not been notified of the institution of any proceedings for, or acquisitions of, judicial confiscations or forfeitures of said items by the State.[33]

Twice during the continuing course of the *United States* v. *Washington* litigation, the district court found it necessary to stay injunctions issued by, and courts.[34] In both instances, the Superior Court of the State of Washington for Thurston County issued injunctions that purported to prohibit the Director of Washington's Department of Fisheries from enforcing regulations issued in compliance with the orders of the federal court.[35]

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[33] United States v. Washington, *supra,* 384 F. Supp. at 388, citations omitted. Judge Boldt's decision was recently affirmed in all but one minor respect. United States v. Washington, *supra,* —— F.2d ——. District Judge Burns, sitting by designation on the Court of Appeals, wrote a short concurring opinion commenting on what he termed the "recalcitrance of Washington State officials" not only in the United States v. Washington litigation, but in two other cases that eventually reached this Court, Antoine v. Washington, *supra,* 420 U.S. 194, and the Puyallup cases, Washington State Game Dept. v. Puyallup Tribe, *supra,* 414 U.S. 44, and Puyallup Tribe v. Department of Game, *supra,* 391 U.S. 392.

[34] Unreported Memorandum Decision and Injunction dated September 12, 1974 and Injunction dated August 6, 1975 in United States v. Washington, *supra,* Civil No. 9213 in the United States District Court for the Western District of Washington at Tacoma.

[35] Puget Sound Gill Netters Association v. Tollefson, No. 50757 and Purse Seine Vessel Owners Assoc. v. Moos, Cause No. 2881.

United States v. *Washington* tells all there is to know about why Indians fight so vehemently to have disputes involving their property resolved in the federal court system. In words that are well worth pondering, particularly here where we are so deluged with unsupported claims of practical problems allegedly caused by the exercise of federal jurisdiction, Judge Boldt spoke of the practical problems attendant upon the exercise of state jurisdiction over off reservation Indian treaty rights.

> [S]tate regulation of off reservation treaty right fishing is highly obnoxious to the Indians and in practical application adds greatly to already complicated and difficult problems and may stimulate continuing controversy and litigation long into the future.[36]

What is most important is that as recently as 1966 Congress recognized both the existence and the legitimacy of the Indians' fear of state courts. Acting partially in response to those fears and also out of conviction that federal Indian law issues should be litigated in the federal courts, Congress enacted a special jurisdictional statute that applies only to suits, primarily involving property rights, brought by the Nation's federally recognized Indian tribes. 28 U.S.C. § 1362. See discussion *supra,* pp. 11-12. This Court should certainly do everything within its power to see to it that these Congressional policies are implemented.

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[36] United States v. Washington, *supra,* 384 F. Supp. at 339.

V. The Petitioners' Concept Of "Unitary" State Water Adjudication Systems Is a Fiction: Their Principal Authorities Are Inapposite.

The petitioners and the *amici* states posit the fiction of "unitary," "comprehensive," and "historic" state water adjudication systems whose all-encompassing and all-embracing nature allegedly leaves no room for the federal courts to resolve the federal questions on which the extent and priority of federal and Indian water rights depend. This is more than mere bravado. Maintenance of this fiction is essential to bring this case in line with *Burford* v. *Sun Oil Company,* 319 U.S. 315 (1943), and its progeny, on which they place their principal reliance.

The Indian *amici* submit that it is the petitioners and the *amici* states who would have this Court ignore the history of federal, Indian and state relations in this area. There has never been a "unitary" state water adjudication system. Historically, state courts have recognized their lack of jurisdiction to adjudicate Indian water rights.[37] Virtually without exception, every prior adjudication of Indian water rights has taken place in the federal courts.[38] *See also* 25

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[37] *See, e.g.,* Anderson v. Spear Morgan Livestock Co., 107 Mont. 18, 79 P.2d 607 (1938).

[38] *See* the 13 (according to our count) reported federal court decisions concerning Indian water rights cited in the chapter on "Indian Water Rights" in 2 Clark, Waters and Water Rights, Chapter 10, 1967. There are numerous other unreported federal court decrees defining Indian rights. The chapter cites two aberrational state court decisions, Byers v. Wa-Wa-Ne, 86 Ore. 617, 169 Pac. 121 (1917), which nicely illustrates why Indians resist state court jurisdiction, and Biggs v. Utah Irrigating Ditch Co., 7 Ariz. 331, 64 Pac. 494 (1901), involving a unique situation in which Indians claimed prescriptive rights to share water from a ditch in common with non-Indians off the reservation who owned and operated the ditch.

U.S.C. § 381 which contradicts petitioner's theory of unitary state control. There is no indication in the McCarran Amendment or its legislative history that the historic practice of leaving Indians on reservations free of state jurisdiction and control, *Rice* v. *Olson, supra,* 324 U.S. at 789, was to be discontinued or abandoned or that it gave rise to any of the problems now being urged. It was not until some 20 years after the McCarran Amendment was enacted that the states, or anyone else, claimed that it provided the requisite authority for Indian water rights to be adjudicated in state courts. Indeed, prior to the assertion of that claim in this case, one of the *amici* states, New Mexico, initiated several proceedings in federal court to adjudicate the water rights of eighteen Pueblos in New Mexico which are still pending.[39]

Burford v. *Sun Oil Co., supra,* 319 U.S. 315 and *Alabama Public Service Commission* v. *Southern Ry. Co.,* 341 U.S. 341 (1950) were diversity cases involving claims of denial of due process by state regulatory agencies. In both cases, the plaintiffs chose to attack the validity of orders issued by the state agencies in federal district courts rather than to pursue their remedies through the state courts. They both dealt with matters that were governed by state substantive law and necessarily required the exercise of considerable discretion as well as policy-making within areas that Congress specifically left to the control of the states. The functions of the state regulatory agencies did not even approximate the adjudication of property rights claimed under and based on federal substantive law. In both cases, this Court wisely held

[39] See Brief of the United States in Opposition to the Petitions for Certiorari at p. 9.

that the federal courts should not allow the state appellate machinery to be circumvented. These cases do not bear the slightest resemblance to this case.[40]

What the federal district court is being asked to do in this case is no different than what this Court did with regard to the water rights of the United States and five Indian Tribes located in three states in *Arizona* v. *California, supra,* 373 U.S. at 595-601, decree, 376 U.S. 340 (1964). Once the priority and amount of the Indians' and federal water rights were fixed by the decree, they could be integrated into any ad-

[40] Another case on which petitioners rely and totally distort is Pacific Live Stock Co. v. Oregon Water Board, 241, U.S. 440 (1916). (See Petitioners' Brief at pp. 20-21 and 25-58.) The plaintiffs in that case sought to enjoin a proceeding conducted by a state agency to determine all water rights on a particular stream. Plaintiffs claimed that the state statute was unconstitutional on due process grounds and that the injunction was necessary to protect the jurisdiction of the federal district court in two pending private diversity suits brought by the plaintiff to enjoin alleged encroachments on his rights. This Court refused to enjoin the state administrative proceeding. It did not enjoin or dismiss or take any other action concerning the cases pending before the district court. It stated that a general adjudication was preferable to piecemeal litigation through private suits. It did not involve the adjudication of any rights based on federal law or the propriety of removal from state to federal court. The federal district court's remand of the attempted removal of the state administrative proceeding took place before the injunctive action was filed. The district court's prior remand order was based on its determination that the removal statute did not apply to state administrative proceedings, 241 U.S. at 445-446. This Court's opinion specifically noted that the remand order was "final and conclusive" and "not subject to review either directly or indirectly." 241 U.S. at 447. It did not say anything about the desirability of litigating general stream disputes or private encroachment suits in either federal or state courts although we certainly have no quarrel with the proposition that such suits should be litigated in state courts when, as in Pacific Live Stock, there are no federal questions presented.

ministrative apparatus for their enforcement. There is certainly no indication whatsoever that this Court's decree in *Arizona* v. *California, supra,* adjudicating federal and Indian water rights interfered in any way with the procedures in California, Nevada and Arizona for determining the water rights of their respective claimants under state law. See Part III *supra.*

The system of adjudicating Indian water rights in federal court has been with us for a long time. Prior to this case no one complained about it. There is no evidence that the "dual" system it has produced has proved unworkable or unmanageable. If it is not as efficient as a unitary system, that is a consequence of federalism and the unique role occupied by Indians in the federal system. Congress has consistently acted in the belief that the federal courts alone were the proper forums for the resolution of Indian property disputes. If the petitioners and their *amici* believe that a departure from this historic procedure is warranted, their argument should be addressed to Congress. *Williams* v. *Lee,* 358 U.S. 217, 223 (1959).

CONCLUSION

The decision of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submittted,

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1 October 1975

APPENDIX

APPENDIX

Act of August 15, 1953, 67 Stat. 588, Public Law 83-280

AN ACT

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of — Indian country affected

California—All Indian country within the State
Minnesota—All Indian country within the State, except the Red Lake Reservation
Nebraska—All Indian country within the State
Oregon—All Indian country within the State, except the Warm Springs Reservation
Wisconsin—All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

SEC. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of — Indian country affected

California—All Indian country within the State
Minnesota—All Indian country within the State, except the Red Lake Reservation
Nebraska—All Indian country within the State
Oregon—All Indian country within the State, except the Warm Springs Reservation
Wisconsin—All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by any Indian tribe, band, or community

in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided,* That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

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